No. 87-920-AFX
Status: GRANTED

Title: Natalie Meyer, Colorado Secretary of State, and Duane Woodard, Colrado Attorney General, Appellants
v.
Paul K. Grant, et al.

Docketed:
November 28, 1987

Court: United States Court of Appeals for the Tenth Circuit

Counsel for appellant: Shuman,Billy J.

Counsel for appellee: Danks,William C.

NOTE* Notice of Appeal filed 10/23/87 cited

Entry	Date	Note	Proceedings and Orders
1	Nov 28 1987	G	Statement as to jurisdiction filed.
2	Dec 17 1987		Motion of appellees Paul K.Grant, et al. to dismiss filed.
3	Dec 29 1987		DISTRIBUTED. January 15, 1988
4	Jan 19 1988		PROBABLE JURISDICTION NOTED.
			**********
5	Feb 11 1988		Record filed.
		*	Certified copy of C.A. proceedings received.
6	Feb 12 1988		Record filed.
7	Mar 2 1988		Joint appendix filed.
8	Mar 2 1988		Brief of appellants Meyer, CO Sec. of St., et al. filed.
9	Mar 11 1988		SET FOR ARGUMENT, Monday, April 25, 1988. (1st case).
10	Mar 31 1988		CIRCULATED.
11	Mar 31 1988	X	Brief of appellees Paul K.Grant, et al. filed.
12	Apr 4 1988	G	Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae filed.
13	Apr 4 1988		Brief amici curiae of American Civil Libertis Union, et al. filed.
15	Apr 14 1988	X	Reply brief of appellants Meyer, CO Sec. of St., et al. filed.
14	Apr 18 1988		Motion of Washington Legal Foundation, et al. for leave to file a brief as amici curiae GRANTED.
16	Apr 25 1988		ARGUED.

87-920

No. .....

In The
Supreme Court of the United States
October Term, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and

DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

vs.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

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106 pp

QUESTION PRESENTED

In the interest of assuring that only initiative measures with a significant modicum of support reach the ballot, may Colorado prohibit payment of petition circulators as long as it otherwise permits unlimited contributions and expenditures?

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In The

Supreme Court of the United States

October Term, 1987

—o—

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and

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Appellees.

—o—

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

JURISDICTIONAL STATEMENT

—o—

The Colorado Secretary of State, Natalie Meyer and the Colorado Attorney General, Duane Woodard, appeal from the judgment of the Tenth Circuit Court of Appeals, dated September 2, 1987, holding Colo. Rev. Stat. sec. 1-40-110 (1980) unconstitutional under the first and fourteenth amendments of the United States Constitution.

—o—

OPINIONS BELOW

The *en banc* opinion of the Tenth Circuit Court of Appeals, which appears in the appendix hereto App. 1, *infra* is reported at 828 F.2d 1446 (10th Cir. 1987). The decisions of the district court and the Panel decision of Tenth Circuit are reported at 741 F.2d 1210 (10th Cir. 1984). The decisions are reprinted in the appendix hereto App. 41, *infra*.

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JURISDICTION

Appellees brought this action against appellants pursuant to 28 U.S.C. sec. 1331 (1980). The judgment of the federal district court sustaining the constitutionality was entered on July 3, 1984. The judgment of the Panel of the Tenth Circuit was entered on July 31, 1984. The appellees requested a rehearing on August 10, 1984. The rehearing was granted on December 20, 1985. The *en banc* decision was entered on September 2, 1987. Appellants filed a Notice of Appeal regarding the *en banc* decision with the Tenth Circuit on October 6, 1986. An Amended Notice of Appeal was filed with the Tenth Circuit on October 23, 1986. A Notice of Appeal was also filed with the district court on October 23, 1986. No rehearing was permitted pursuant to Tenth Circuit Rule 35.6. This appeal is being docketed within 90 days from the date of the Tenth Circuit's judgment. The Supreme Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(2) (1966), which provides for appeal to the supreme court when a federal court declares a state statute to be unconstitutional.

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CONSTITUTIONAL PROVISIONS AND STATUTES

A. First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

B. Fourteenth Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

C. Colo. Rev. Stat. sec. 1-40-110 (1980)

Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. (1973).

STATEMENT OF THE CASE

Meyer, as Secretary of State, is charged with the administration and enforcement of the initiative and referendum laws. Section 1-40-119, C.R.S. (1980). The Attorney General has authority to institute criminal proceedings if a violation of the initiative and referendum laws has occurred. Section 1-40-119, C.R.S. (1980).

Colorado is one of 23 states to allow its citizens to place propositions on the ballot through the initiative process. (Appellants Exhibit E). Colo. Const. art. V, sec. 1; Colo. Rev. Stat. secs. 1-40-101 to 119 (1980). Under Colorado law, proponents of an initiative measure must submit the measure to the directors of the State Legislative Council and the Legislative Drafting Office for review and comment. The draft is then submitted to a three member title board, which prepares a title, submission clause and summary. The proponents of the measure then have 6 months to obtain the necessary signatures, which must be in an amount equal to at least 5 percent of the total number of voters who cast votes for all candidates for the Office of Secretary of State at the last preceding general election, and to file the petition with the Secretary of State. If these requirements are met, the measure will appear on the ballot at the next general election. Colo. Rev. Stat. secs. 1-40-101 to 105 (1980 & 1986 Supp.); *Dye v. Baker*, 143 Colo. 467, 354 P.2d 498, 500 (Colo. 1960).

The petition circulators are required to sign an affidavit stating that such signature is the signature of the person whom it purports to be and, that to the best of their knowledge and belief, each person signing the petition is a registered elector. Colo. Rev. Stat. sec. 1-40-109 (1986 Supp.). Colo. Rev. Stat. sec. 1-40-110 (1980) prohibits

payment of petition circulators and establishes criminal penalties for violations of 1-40-110.

In 1984, the appellees submitted their initiative measure to the Secretary of State. The appellees wanted to pay circulators because they believed that paying circulators would enhance their chance of obtaining the requisite number of signatures. The appellees brought suit challenging the constitutionality of the prohibition against payment of petition circulators. They asked the trial court to declare unconstitutional section 1-40-110 on the ground that it violated their first amendment rights to political speech. They also asked the district court to enjoin enforcement of section 1-40-110.

At trial one appellee testified that a circulator could take more time away from his job if he were paid. (Transcript, pp. 13, 20). Another testified that he would like to be able to pay circulators so that he would have more time to devote to his work. (Transcript p. 42). A third appellee stated that paid petition circulators have more incentive to obtain signatures. (Transcript, p. 34).

The state presented evidence which showed that Colorado's signature requirement was more liberal than signature requirements in at least 14 of the 17 states that allow a constitutional amendment to be adopted through the initiative process. (Transcript, pp. 75-76). Of the 23 states that have a statewide initiative process, Colorado ranked No. 4 in the number of initiatives on the ballot in the years preceding 1969, ranked No. 2 in the years between 1969 and 1979, and ranked in the top four in the years 1980 to 1982. For the years 1978, 1980, and 1982, the percentage of petitions reaching the ballot was equal to or above the national average. (Transcript pp. 53-55).

The state also presented testimony that volunteer petition drives fare much better on election day than do paid petition drives.

The state's evidence established that paying circulators will transform a grassroots, volunteer effort into a commercialized venture, which undermines the ability of the state to determine whether there is sufficient public support to warrant the time and expense of placing the measure on the ballot. The state showed that paid circulators, in many instances, are more interested in collecting signatures than in informing citizens about the substance of the proposal. (Transcript, pp. 83, 87-88).

The trial court held that section 1-40-110 was constitutional. It concluded that the first amendment rights of the appellees were not affected and that, even if first amendment rights were implicated, the state had a compelling interest in maintaining the grassroots nature of the initiative process.

On appeal, a majority of the panel of the Tenth Circuit adopted the district court's opinion. In a dissent Judge Holloway argued that the prohibition unconstitutionally violated appellees' first amendment rights. Upon rehearing, *en banc* the Tenth Circuit reversed the district court's decision and, in a 6-2 decision, held that the prohibition unconstitutionally restricted the first amendment rights of the appellees.

———o———

THE QUESTION IS SUBSTANTIAL

The case presents the unique and substantial question as to whether Colorado's prohibition against payment of petition circulators violates the First and Fourteenth

Amendments when the prohibition is the only limitation on the expenditure or contribution of money. This is the first case to come to this Court in which only one type of contribution or expenditure has been prohibited. Previously, this Court has addressed only broad-based limits on total contributions and expenditures.

The initiative, as a tool of direct democracy, arose during the height of the progressive movement, lasting from approximately 1898-1919. During this period distrust of big business, and particularly political organizations, was underscored by a firm belief that government should be in the hands of the people; that political bosses and machines should be overthrown; and that through reforms, democracy, liberty and rule of law would be achieved. *See* Magleby, David B., *Direct Legislation: Voting on Ballot Propositions in the United States*, Johns Hopkins University Press, 1984, pp. 21-22.

This movement toward direct democracy in the early part of the century was a western political phenomenon. South Dakota was the first state to adopt direct legislation in 1898; Oregon was the first state to adopt the initiative in 1902. Colorado adopted the initiative in 1910. Twenty-two of the twenty-six states that now have direct legislation adopted it during the progressive era (1898-1919). Since the 1970's, widespread interest in direct legislation is reflected by the number of states (21) which have considered adoption of the direct legislation process. In the 1970's and early 1980's the simplistic view of the educated enlightened voter espoused by the progressive movement became subverted by the proliferation of special interest groups who have used the initiative process to accomplish legislation favorable to their cause. *See* Magleby "*Ple-*

biscitary Democracy: The Initiative and Referendum in American Politics," National Center for Initiative Review, 27 Dec. 1983.

Prior to 1941, Colorado had no law prohibiting payment to petition circulators. As a result, petition circulators were paid to obtain signatures. The payment of circulators was challenged as inherently fraudulent in the case of *Brownlow v. Wunsch,* 103 Colo. 120, 83 P.2d 775 (1938). The Colorado Supreme Court found that payment to petition circulators was not prohibited by either statute or constitution. However, it impliedly expressed reservations about the effects of such payment on the integrity of the process. It stated:

> To the extent that the fraud charged is premised on the advertisement for circulators and the latter being paid for names procured, without reference to our views as to the ethics of such procedure, it is sufficient to say that this practice is not prohibited by either the constitution or statutes.

Id. at 782.

The Colorado Legislature has the duty to secure the purity of elections and guard against abuse of the elective franchise. Colo. Const. art. VII, sec. 11. This duty includes establishing procedures to protect the grassroots initiative petition process. *Case v. Morrison,* 118 Colo. 517, 197 P.2d 621, 623 (1948). In order to insure the integrity of the process, the Legislature, apparently in response to abuses of the sort chronicled in *Brownlow,* passed the prohibition against payment of circulators. *See* 1941 Colo. Sess. Laws 486, sec. 6.

The question presented herein contains several components which the majority decision of the Tenth Circuit failed to address properly.

1. To what extent does the historical genesis of the direct legislation movement permit the state to prohibit payment of petition circulators? The majority in the Tenth Circuit ruled that once the state adopted the initiative process, it could not prohibit the payment of petition circulators. The majority fails to acknowledge the historical purpose of the initiative and the right of the state to enhance the citizens' interest and confidence in government. *Cf. First National Bank of Boston v. Bellotti,* 435 U.S. 765, 788-89 (1978). The methods by which a state chooses to structure its electoral system are entitled to substantial deference *Rodriguez v. Popular Democratic Party,* 457 U.S. 1, 8 (1982).

It is obvious that the Colorado Legislature concluded that paying petition circulators would undermine the public's confidence in the initiative process. This concern is reasonable, given the fact that the undue influence of monied interests was the underlying catalyst for the direct legislation movement.

2. To what extent may the state regulate ballot access of initiative measures? The majority of the Tenth Circuit failed to recognize that the state has a compelling interest in effectuating a system which avoids confusion, deception and frustration of the democratic process. *See Munro v. Socialist Workers Party,* 107 S. Ct. 533, 537 (1986). In the initiative process, the state has a strong interest in requiring a significant modicum of support. The evidence in the case showed that the prohibi-

tion did not impede access to the ballot or the likelihood of success when the proposed measures reached the ballot. Of the 23 states that had a statewide initiative process at the time that this case was tried, Colorado ranked No. 4 in number of initiatives on the ballot in the years preceding 1969, ranked No. 2 in the years between 1969 and 1979, and ranked in the top four in the years 1980 to 1982. The evidence also established that for the years 1978, 1980 and 1982, the percentage of petitions reaching the ballot in Colorado was equal to or above the national average. Colorado's signature requirement for a proposed amendment to the state constitution is less stringent than the signature requirements in at least 14 of the 17 states that allow a constitutional amendment to be adopted through the initiative process. Colorado does not require signature validation by the state. Moreover, the prohibition against payment of circulators is the only limitation; advocates can spend unlimited amounts of money to advance their cause. Compare *Buckley v. Valleo,* 424 U.S. 1 (1976).

3. To what extent does payment of petition circulators constitute speech by proxy? The majority of the Tenth Circuit rejected the idea that payment of petition circulators constitutes speech by proxy. It is undisputed that the appellees were citizens who supported an initiative measure and who were contributing directly to have others express their positions for them. There can be no doubt that such payment constitutes speech by proxy which is not entitled to full first amendment protection. *Citizens Against Rent Control v. Berkeley,* 454 U.S. 290, 301 (1981) (Justice Marshall, concurring).

4. Does the payment of persons to circulate petitions constitute conduct or speech? The Tenth Circuit majority incorrectly held that payment is pure speech. The Supreme Court has differentiated between speech and conduct. Proscribing a course of conduct because it was initiated, evidenced or carried out by language is not an abridgement of first amendment rights. *Ohralik v. Ohio State Bar Association,* 436 U.S. 447, 456 (1978). The prohibition places only an incidental restriction on the time, place and manner of expression. The prohibition does not abridge free speech because payment of petition circulators bears no reasonable relationship to the success of the petition. *Members of City Council v. Vincent,* 466 U.S. 78, 808-09 (1984). As noted, the success rate of initiative measures in Colorado is substantially higher than the rates in other states. Nothing in the record indicates that paying petition circulators is a uniquely valuable or important mode of communication.

CONCLUSION

The question presented herein is extremely important to the right of the states to regulate the direct legislation process in the United States.

The initiative election was created to insure that the voices of elector without vast resources will be heard. Historically, several states prohibited such payment. However, court decisions have destroyed the underlying rationale of the initiative process. *Grant v. Meyer,* 828 F.2d

1446, 1457-58 (10th Cir. 1987) and cases cited therein. The Tenth Circuit and other courts have silenced these voices.

For the above-stated reasons the court should note probable jurisdiction of the appeal.

Respectfully submitted,

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APPENDIX

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,	)	
Plaintiffs-Appellants,	)	No. 84-1949
v.	)	
NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, Colorado Attorney General,	)	
Defendants-Appellees.	)	

OPINION ON REHEARING EN BANC

(Filed September 2, 1987)

Appeal from the United States District Court
For the District of Colorado

(D.C. No. 84-JM-1207)

William C. Danks, Denver, Colorado, for Plaintiffs-Appellants

Maurice G. Knaizer, First Assistant Attorney General, Denver, Colorado, for Defendants-Appellees

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Before HOLLOWAY, Chief Judge, BARRETT, McKAY, LOGAN, SEYMOUR, ANDERSON, TACHA and BALDOCK, Circuit Judges

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HOLLOWAY, Chief Judge

This appeal involves the constitutionality, under the First and Fourteenth Amendments, of Colo. Rev. Stat. § 1-40-110 (1980)[1] which makes it a criminal offense[2] to pay

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[1] Colo. Rev. Stat. § 1-40-110, as enacted, provides:

> Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of any initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973.

This statute has been challenged on several occasions since its enactment. In *Urevich v. Woodard*, 667 P.2d 760 (Colo. 1983), the Supreme Court of Colorado held that "the language of section 1-40-110 is too broad to survive strict scrutiny" with respect to the right of initiative under the Colorado Constitution and accordingly narrowed the statute by construction to delete the word "inducement." *Id.* at 763-64. The court did not express any view on the propriety of the regulation of "consideration." *Id.* at 763.

We also note that a group of Colorado residents recently filed an action in the Colorado courts, arguing that Colo. Rev. Stat. § 1-40-110 does not apply to the circulation of a referendum seeking the repeal of a city ordinance. In the alternative, the plaintiffs argued that if the statute was applicable to their referendum, then it was in violation of their state constitutional rights to free speech, free assembly and petition, freedom of association and power of referendum. *Hermes v. City of Com-*

(Continued on following page)

any consideration for the circulation of initiative or referendum petitions.

The plaintiffs initiated a petition to amend the Colorado Constitution by removing motor carriers from the jurisdiction of the State Public Utilities Commission. In order to obtain the required number of signatures, the plaintiffs wished to pay other individuals to circulate the petitions. Plaintiffs brought suit under 42 U.S.C. § 1983

(Continued from previous page)

merce City, No. 86-CV-2203, Verified Complaint at 3-6 (D. Ct. Adams County, Colo., Sept. 17, 1986). The trial judge agreed and held that the statutory ban against payment of petition circulators is unconstitutional. *Hermes v. City of Commerce City*, No. 86-CV-2203, Reporter's Transcript at 5-7 (D. Ct. Adams County, Colo., Oct. 31, 1986). Some of the plaintiffs appealed the district judge's ruling to the Supreme Court of Colorado on December 3, 1986. *Ford v. City of Commerce City*, No. 86-SA-459 (Colo. Dec. 3, 1986) (Notice of Appeal). However, the City Council apparently voted to repeal the ordinance in question slightly more than one month later, and the defendants accordingly moved to dismiss the appeal as moot. *Ford v. City of Commerce City*, No. 86-SA-459, Motion to Dismiss Appeal or in the Alternative for an Extension of Time at 1, 2 ¶ 1 (Colo. July 15, 1987). The Supreme Court of Colorado granted the motion to dismiss the appeal on July 23, 1987. *Ford v. City of Commerce City*, No. 86-SA-459 (Colo. filed July 24, 1987).

Finally, we note that the same group of plaintiffs filed a related action in federal district court which raised similar claims based on federal constitutional law. *Hermes v. Commerce City*, No. 86-Z-1883 (D. Colo. filed Sept. 12, 1986). Although there has been no final ruling in that case, the plaintiffs have stated in their briefs to the Supreme Court of Colorado that they would ask the federal district court to dismiss the action if the state appeal was found to be moot. *Ford v. City of Commerce City*, No. 86-SA-459, Reply to Objection to Motion to Dismiss Appeal at 2 (Colo. received July 23, 1987).

[2] Violation of the statute is a class 5 felony, which is punishable by one to two years' imprisonment plus one year of parole as the "presumptive" range of penalties. Colo. Rev. Stat. § 18-1-105 (1986 cum. supp.).

(1982) claiming that the statutory prohibition against such payment violates their rights of free speech and political association. The district court rejected the constitutional claim. A divided panel of this court affirmed, adopting the opinion of the district court. 741 F.2d 1210, 1211 (10th Cir. 1984) (per curiam). We granted rehearing en banc and vacated the panel opinion. 780 F.2d 848 (10th Cir. 1985). After consideration of supplemental briefs and reargument to the court en banc, we now reverse.

I

The critical facts are not in dispute. Colorado is one of 23 states to allow its citizens to place propositions on the ballot through the initiative process. Colo. Const. art. V, § 1; Colo. Rev. Stat. § 1-40-101 et seq. (1980); *see* Defendant's Exhibit E ("Initiative Provisions by State"). Under Colorado law, sponsors of the initiative must submit their proposition to the directors of the State Legislative Council and Drafting Office for review and comment. The draft is then submitted to a three-member board,[3] which prepares a title, submission clause and summary. The proponents of the initiative then have six months to obtain the necessary signatures and file the petition with the Secretary of State.[4] If these requirements are met, the submission clause will appear on the

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[3] The three-member board consists of the Secretary of State, Attorney General, and Director of the Legislative Drafting Office. Colo. Rev. Stat. § 1-40-101(2) (1980).

[4] The petition must be "signed by registered electors in an amount equal to at least five percent of the total number of voters who cast votes for all candidates for the office of secretary of state at the preceding general election." Colo. Rev. Stat. § 1-40-105 (1986 cum. supp.).

ballot at the next general election. Colo. Rev. Stat. § 1-40-101-105 (1980 & 1986 cum. supp.); *Dye v. Baker*, 354 P.2d 498, 500 (Colo. 1960).

The plaintiffs submitted their initiative measure to the Secretary of State, and set out to obtain the required 46,737 signatures of registered voters. When the trial began the plaintiffs had slightly over one month remaining to obtain approximately 30,000 more signatures.

II

We have considered, *sua sponte*, several questions relating to the justiciability of the constitutional issue presented: (1) the desirability of abstention because of the criminal sanctions in the Colorado statute banning the payment of initiative petition circulators; (2) the question of ripeness since the plaintiffs have not yet been prosecuted for violating the Colorado statute; and (3) the possibility that the appeal is moot since the November 1984 election, which was originally in question, has already passed. We conclude that we should decide the merits of the appeal.

A.

We feel that abstention is not proper here. In opposing an injunction pending appeal, the State's memorandum cited *Younger v. Harris*, 401 U.S. 37 (1971), *inter alia*, arguing that grounds for injunctive relief against enforcement of the State criminal statute were not demonstrated. On appeal, however, the plaintiffs have omitted their prayer for injunctive relief, expressing confidence that a declaratory judgment would be respected by the defendants. We feel that there is no impediment to affording these

plaintiffs declaratory relief in order to vindicate their rights under the First and Fourteenth Amendments.[5]

B.

We also believe the dispute is ripe despite the absence of a pending criminal prosecution against any of the plaintiffs. The plaintiff class consists of five individuals and a corporation called "Coloradans for Free Enterprise, Inc." The individual plaintiffs are registered voters in Colorado and several of them testified that they wished to pay others for their time and labor in circulating the petitions. Additionally plaintiffs Grant and Hoskins have been designated as representatives of the petition to deregulate Colorado's transportation industry and plaintiff Coloradans for Free Enterprise, Inc., has supported the petition. Plaintiff's Exhibit 1.

The plaintiffs are therefore parties "against whom these criminal statutes directly operate. . . ." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). "Moreover, the State has not disavowed any intention of invoking the criminal penalty provision . . . " against these plaintiffs, *Babbitt*

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[5] In their petition for rehearing, the plaintiffs requested this court to certify the question of the statute's constitutionality to the Colorado Supreme Court. Petition for Rehearing and Suggestion for Rehearing in Banc at 1 n.1. Here, however, certification would be improper since the state statute is unambiguous, *See Wisconsin v. Constantineau*, 400 U.S. 433, 439 (1971), and the plaintiffs do not question the statute's validity under state law. *See* Colo. App. R. 21(a). The Supreme Court recently declined a request for certification, stating that "[i]t would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim." *City of Houston v. Hill*, 55 U.S.L.W. 4823, 4829 (U.S. June 15, 1987).

v. United Farm Workers National Union, 442 U.S. 289, 302 (1979), and the State here is vigorously upholding the statute in litigation with these plaintiffs. "[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative, a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.' " *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)). Thus the positions of the parties are sufficiently adverse for us to reach the merits of plaintiffs' constitutional claim. *Wilson v. Stocker*, 819 F. 2d 943, 946-47 (10th Cir. 1987).

C.

We also believe that the appeal is not moot even though the November 1984 general election has passed, as the Court held in *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 774-75 (1978). It is well settled that an appeal is not moot if the dispute is "capable of repetition, yet evading review." *See, e.g., Press-Enterprise Co. v. Superior Court*, 54 U.S.L.W. 4869, 4871 (U.S. June 30, 1986); *Southern Pacific Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911). Under such a rationale two requirements must be met. First, the duration of the challenged action must be too short for completion of litigation prior to its cessation or expiration. Second, there must be a reasonable expectation that the same complaining party will be subjected to the same action again. *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 187 (1979); *Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (per curiam).

These requirements are satisfied here. First, Colorado law requires proponents of an initiative to obtain a

substantial number of signatures within a six-month period. Even if a proponent could obtain a favorable ruling within that time, he would likely be unable to take advantage of his victory by using paid circulators to obtain the necessary signatures. *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 774 (1978). Second, Colorado continues to prohibit the payment of circulators and the initiative to deregulate Colorado's transportation industry apparently has not yet been enacted. As a result we can reasonably expect that the same dispute will erupt again between the parties. *See id.* at 774-75; *Mandel v. Bradley,* 432 U.S. 173, 175 n.1 (1977) (per curiam).

For these reasons we turn to the merits of plaintiffs' constitutional claim.

III

A.

As noted, the district court rejected the plaintiffs' claim on the merits, finding that the statute does not impose a burden on their right to free speech. The court stated that plaintiffs are not restricted in the personal communication of their belief in the proposition; that their ability to spend money on every other form of thought dissemination is totally unfettered; and that the statute only restricts generalized support for political thought, much as the contribution of money was regarded in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam). The court also "[took] seriously" the State's interests sought to be achieved by the statute—(1) protecting the integrity of the initiative process, and (2) insuring a broad base of support for any initiated measure.

As to the first asserted state interest, the court found that the testimony lends credence to the State's contentions that paid circulators would be persuaded to use sales techniques, not inherently illegal, just to enhance their own compensation. The court also referred to testimony about an incident in Florida where circulators padded petitions with names taken from a telephone book and cited evidence that no effort is made in Colorado to verify the validity of signatures except on the filing of written objections.

With respect to the second asserted state interest, the district court pointed to evidence of the history of the initiative process as supporting the State's contention that there is a significant need to insure any measure has a substantial base of support before it is submitted to the electorate. Specifically, the court pointed out that the initiative process originated in the West as a "grassroots" means of protecting citizens from overpowering special interest groups, and that this process is relatively rigid in practice in that once the measure is submitted to State officers for review and presented to the public, it cannot be changed.

We are convinced that the district court's views cannot be reconciled with the Supreme Court's recent decisions. For example, in *Buckley v. Valeo,* 424 U.S. 1 (1976) (per curiam), the Court addressed the constitutionality of limitations on campaign contributions and expenditures imposed by the Federal Election Campaign Act of 1971, as amended in 1974. Pub. L. No. 92-225, § 608, 86 Stat. 3, 9 (1971) *amended by* Pub. L. No. 93-443, § 101, 88 Stat. 1263 (1974). The Court held that the limits on contributions did not violate the contributors' First Amend-

ment rights of free speech or political association. *Id.* at 58.[6] In doing so, the Court conceded that the statute restricted the quantity of expression available to political contributors, but concluded that the restrictions were justified by the "weighty interests" of limiting the actuality and appearance of corruption resulting from large individual financial contributions. 424 U.S. at 23-38.

However, the Court invalidated various limitations on expenditures, such as the prohibition against individuals or groups spending more than $1000 per year on behalf of a political candidate. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(e)(1), 88 Stat. 1263, 1265; *see Buckley,* 424 U.S. at 58.[7] Stressing that expenditures for candidates are "permeated by First Amendment interests," the Court found that the Government's asserted interests in preventing the actuality or appearance of corruption were inadequate to justify the ceilings on independent expenditures. *Id.* at 39-51. The Court explained:

> The Act's expenditure ceilings impose direct and substantial restraints on the quantity of political

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[6] These limitations included, *inter alia,* a maximum of $1000 on contributions by individuals and groups to candidates and authorized campaign committees, a $5000 limitation on campaign contributions by political committees, and a $25,000 limitation on total contributions by an individual during a calendar year. Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, § 101(b)(1), (2), & (3), 88 Stat. 1263, 1263.

[7] The Court in *Buckley* also invalidated limitations on the amount a candidate could spend from his personal or family funds, and limitations on overall campaign expenditures by candidates seeking nomination or election for federal office. 424 U.S. at 51-58.

> speech . . . It is clear that a primary effect of these expenditure limitations is to restrict the quantity of campaign speech by individuals, groups, and candidates. The restrictions, while neutral as to the ideas expressed, limit political expression "at the core of our electoral process and of the First Amendment freedoms."

Id. at 39 (quoting *Williams v. Rhodes,* 393 U.S. 23, 32 (1968)).

Since 1976 the Court has relied on *Buckley* as authority for the general rule that limits on political expression are contrary to the First Amendment. For example, the Court recently cited on *Buckley* for the proposition "that preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances." *Federal Election Commission v. National Conservative Political Action Committee,* 470 U.S. 480, 496-97 (1985). To date the Court has found these governmental interests sufficient to survive exacting scrutiny only when the statute restricts political contributions to a candidate. For example, in *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California,* 454 U.S. 290 (1981), the Court invalidated a city ordinance that limited contributions to committees formed to support or oppose ballot measures, banning any contribution which would cause the total amount contributed by the person to exceed $250. Distinguishing *Buckley,* the Court stated:

> *Buckley* identified a narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* . . . Federal Courts of Appeals have recog-

> nized that *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures.*

Id. at 296-97 (emphasis in original).

In discussing the ordinance's impermissible restraint on freedom of expression, the Court noted that by limiting contributions the ordinance "automatically affects expenditures" and that "limits on expenditures operate as a direct restraint on freedom of expression" of groups engaging in ballot measure campaigns. *Id.* at 299. Distinguishing candidate and ballot measure campaigns, the Court emphatically concluded that "*there is no significant state or public interest in curtailing debate and discussion of a ballot measure.*" *Id.* (emphasis added). The Court reasoned that the integrity of the political system could be adequately protected by alternative means such as public disclosure or a prohibition against anonymous contributions. The Court also pointed out that freedom of association is diluted if it does not include the right to pool money through contributions because funds are essential to effective advocacy. *Id.* at 296. The ordinance was held invalid as a restraint on both the right of association and of expression protected by the First Amendment. *Id.* at 299-300.

The distinction between the State's interests in regulating campaigns for candidates and for ballot measures was also discussed in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1978). There the Court struck down a state criminal statute prohibiting corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted

to the voters, other than one materially affecting any of the property, business or assets of the corporation." As noted by the Ninth Circuit in *C & C Plywood Corp. v. Hanson,* 583 F.2d 421, 424-25 (9th Cir. 1978), *Bellotti* made no distinction between contributions and expenditures in deciding that the statute was unconstitutional; however, it did draw a clear distinction between ballot issues and partisan elections. The Court observed that:

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing." . . . We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . . "

Bellotti, 435 U.S. at 790-91 (footnote and citations omitted); *see also Let's Help Florida v. McCrary,* 621 F.2d 195, 197, 199-201 (5th Cir. 1980) (invalidating Florida statute that restricted size of contributions to any political committee in support of, or opposition to, ballot issues); *C & C Plywood Corp. v. Hanson,* 583 F.2d at 424-25 (invalidating Montana law that prohibited corporations from making contributions in support of, or opposition to, ballot issues); *Schwartz v. Romnes,* 495 F.2d 844, 852-53 (2d Cir. 1974) (New York statute that prohibited corporate contributions for political purposes must be construed nar-

rowly under First Amendment so that corporations may contribute to referendum campaign).

The clear import of the decisions of the Supreme Court is that restraints on political association and communication, imposed by restrictions on financing of campaigns for ballot measures, are suspect and subject to strict scrutiny. Coloradans for Free Enterprise, Inc., and the individual plaintiffs are barred from reaching out through paid solicitors to contact more of the public. When examined with the exacting scrutiny which the Court's decisions demand, the Colorado ban on compensation of solicitors, as applied to these proponents of the initiative measure, fails since all of the interests which the State suggests in defense of this prohibition are or can be protected by less intrusive measures.

B.

As noted, the district court concluded that the Colorado statute does not impose a burden on plaintiffs' right to free speech because they could still personally communicate their belief in the proposition.[8] We think this reasoning cannot be reconciled with *Buckley* and the testimony at trial. The record evidence shows without dispute

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[8] The district court also considered the availability of other channels of communication in its analysis. This factor only becomes relevant in measuring the reasonableness of time, place, and manner regulations. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288 (1984). The statute's ban on the payment of circulators, however, which so directly and substantially restricts plaintiffs' right to political speech, cannot be fairly characterized in those terms. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State*, 308 U.S. 147, 163 (1939).

that a petition circulator, in obtaining signatures to a petition, engages in the communication of political ideas. The circulator approaches a stranger, asks him if he is a registered voter, and, if the person is willing to listen, advances arguments why the petition should be placed on the ballot.[9]

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[9] Paul Grant, one of the plaintiffs, gave the following testimony based on his experience as a petition circulator:

> [T]he way that we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them, "Are you a registered voter?"
>
> Many people say, "I haven't got time, don't bother me," or "Yes, I am, but it is none of your business," or "Yes, I am, so what?"
>
> If you get a yes, then you tell the purpose your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, "Please let me know a little bit more." Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from PUC regulations.
>
> Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign. If they don't, you say, "Thanks, have a nice day."
>
> * * *
>
> [We] [t]ried to explain the not just deregulation in this industry, that it would free up the industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.

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See II R. 10-12, 43. This process of soliciting signatures is therefore closely intertwined with a discussion of the merits of the measure. *See Ficker v. Montgomery County Board of Elections,* No. R-85-4365, slip op. at 3-4 (D. Md. Dec. 23, 1985); *Clean-Up '84 v. Heinrich,* 590 F. Supp. 928, 930 (M.D. Fla. 1984); *Libertarian Party of Oregon v. Paulus,* Civ. No. 82-521FR, slip op. at 4 (D. Ore. Sept. 3, 1982); *Hardie v. Fong Eu,* 556 P.2d 301, 303 (Cal. 1976), *cert. denied,* 430 U.S. 969 (1977); *cf. Secretary of State v. Joseph H. Munson Co.,* 467 U.S. 947, 959 (1984) (relying on *Village of Schaumburg v. Citizens for A Better Environment,* 444 U.S. 620 (1980), for the proposition that charitable solications (sic) are so intertwined with speech that they are entitled to protection of First Amendment).[10]

(Continued from previous page)

> We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them.

II R. 10-11.

[10] The defendants argue that petition circulators are "election judges" whose primary duty is to assure the validity of signatures. Appellees Brief on Rehearing at 11; *see Sturdy v. Hall,* 143 S.W.2d 547, 550 (Ark. 1940). As a result, the defendants argue, any discussion of the merits of the petition is inconsistent with the circulators' governmental responsibilities.

We find the argument unconvincing. Apart from counsel's post-hoc assertions before this court, we find no evidence that the Colorado legislature intended for the solicitation process to be devoid of political advocacy. *See* P. Starr, *The Initiative and Referendum in Colorado* 9-21 (Aug. 11, 1958) (Master's Thesis) (reviewing history of Colorado's adoption of the initiative procedure). It is true that the Government has a special

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The record also establishes that the available pool of circulators will be smaller if they cannot be compensated for their work. The district court itself acknowledged that "the evidence indicates plaintiffs' purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers." I R. 38; *see also Urevich v. Woodard,* 667 P.2d 760, 763 (Colo. 1983) ("We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay."). Only a limited number of individuals can afford to devote the substantial amounts of time that may be necessary to collect signatures on a purely volunteer basis.[11] Furthermore there are practical limi-

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interest in regulating the speech of its employees, *see United States Civil Service Commission v. National Association of Letter Carriers,* 413 U.S. 548, 564 (1973) (quoting *Pickering v. Board of Education,* 391 U.S. 563, 568 (1968)); but we do not think that petition circulators can be fairly characterized in this manner.

[11] Paul Grant testified:

> Money is very definitely a motivating factor to get someone to work on behalf of an effort, a matter of raising the demand and you get more supply. You pay people. You pay them more. You get more people able and willing to do it. Many of the people that I work with in the Coloradans for Free Enterprise, most of them—well, the majority of the people I work with in the Libertarian Party are people who have jobs, and they either have jobs or don't have jobs. If they do have jobs, they can't afford to take time off to work on the drive. If they don't have jobs, and they are looking for them, they can't afford to be volunteers. So money either enables people to forego leaving a job, or enables them to have a job.

II R. 19-20.

tations on the sponsors' ability to motivate volunteers because of the rejection that petitioning necessarily brings.[12]

Thus, the effect of the statute's absolute ban on compensation of solicitors is clear. It impedes the sponsors' opportunity to disseminate their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached. *See Ficker v. Montgomery County Board of Elections,* slip op. at 5; *Libertarian Party of Oregon v. Paulus,* slip op. at 4. In short, like the campaign expenditure limitations struck down in *Buckley,* the Colorado statute imposes a direct restriction which "necessarily reduces the quantity of expression . . . ." *Buckley,* 424 U.S. at 19.

C.

In light of the Colorado statute's restriction on plaintiffs' political expression and their efforts to communicate through petition circulators they would employ, it is incumbent on the State to show that the governmental

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[12] Lori Massie, Director of Recruitment for the ballot drive, testified:

> A petition circulator can very easily be motivated by money. If he knows he can collect money for his efforts, he is far more likely to spend six hours a day at it, than he would otherwise. The way it is right now, it is kind of a painful process to go out there and stand and ask people to sign something, and after an hour of being beaten over the head with "no's" or "drop dead" or whatever, if they were being paid and they knew that their success would relate to their pay, they would work on it. They would probably polish up their techniques also.

II R. 34.

interests suggested satisfy the exacting scrutiny given to limitations on core First Amendment rights of political expression. *See Buckley,* 424 U.S. at 44-45, 47-48. No such showing has been made here.

First, we cannot accept the district court's initial rationale for upholding the ban on payment of petition circulators—*i.e.,* protection of the integrity of the initiative process. Although the State has every right to take strong measures to prevent overreaching, improper offers of consideration for signatures, fraudulent signatures and other dishonest activities by petition circulators, the State may do so only by measures tailored to attack those problems within clearly recognized areas permitted by the Supreme Court. This is borne out by the teachings of the Court's recent opinions. Solicitation of signatures for the ballot measure "is not so inherently conducive to fraud and overreaching as to justify its prohibition." *Village of Schaumburg v. Citizens For a Better Environment,* 444 U.S. 620, 637-38 n.11 (1980). The broad intrusion banning the use of paid circulators entirely is not tailored to the least intrusive remedy, as *Buckley* and its progeny demand.

Although the State strenuously argues that it is not asserting a concern about fraud, it seems clear that the State has been compelled to attempt to avoid the Court's rejection in *Buckley* of the rationale of preventing fraud. *Buckley* held that the prevention of corruption did not constitute an interest sufficiently substantial to warrant the direct infringement of political communication represented by campaign expenditure limitations; that concern could be addressed by other measures. 424 U.S. at 45, 55-56; *cf. Secretary of State v. Joseph H. Munson Co.,*

467 U.S. at 967-68 n.16 (1984) (concerns about unscrupulous professional fundraisers or fraudulent charities not a sufficient state interest to justify prohibiting charitable organizations, in connection with fundraising activities, from paying expenses of more than 25% of amount raised; such concerns could be accommodated directly through disclosure and registration requirements and penalties for fraudulent conduct).

The State makes no showing that the Colorado General Assembly cannot effectively protect the integrity of the initiative process by laws more narrowly tailored to specific abuses. Colorado has existing statutes that make it unlawful to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. *See* Colo. Rev. Stat. §§ 1-13-106, 1-40-119, 1-40-110 (1980). The statutes also require that conspicuous warnings of criminal offenses be printed on every petition and that circulators attach an affidavit attesting, *inter alia*, to the validity of the petition's signatures. *See* Colo. Rev. Stat. § 1-40-106 (1986 cum. supp.); *see also* Colo. Const. art. V, § 1. Finally, the Colorado statutes provide elaborate protest procedures for challenging the sufficiency of signatures on any petition, permitting both an administrative determination and an opportunity for judicial review.[13] *See* Colo. Rev. Stat. § 1-40-109 (1986 cum. supp.). Thus the State's "legiti-

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[13] For examples of judicial review of ballot measures in Colorado, see *Spelts v. Klausing*, 649 P.2d 303 (Colo. 1982); *Billings v. Buchanan*, 555 P.2d 176, 176-79 (Colo. 1976); *Case v. Morrison*, 197 P.2d 621, 621-24 (Colo. 1948); *Haraway v. Armstrong*, 36 P.2d 456, 457-58 (Colo. 1934); *Miller v. Armstrong*, 270 P. 877, 878-79 (Colo. 1928).

mate interest in presenting fraud can be better served by measures less intrusive than a direct prohibition or solicitation" by paid circulators of petitions. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. at 637.

The State suggests that paid petition circulators may be too persuasive, or use irrelevant arguments, in convincing persons to sign the petitions. It suffices to say that the relative merits of the method of presentation and of the ballot measure itself are for the public to weigh and consider. The First Amendment is a value-free provision whose protection is not dependent on "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). "The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind . . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Second, we cannot accept the State's defense of the statute based on its assertion of a compelling interest in requiring that an initiative have a wide base of public support before an initiative measure is placed on the ballot. This argument ignores the requirement in Colo. Rev. Stat. § 1-40-105 (1986 cum. supp.) that a petition be signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of Secretary of State at the previous general election. Such a requirement for petition signa-

tures, which in this case called for a minimum of 46,737 signatures of registered voters, protects the State's interest in requiring a broad case of popular support. *See* Sirico, *The Constitutionality of the Initiative and Referendum*, 65 Iowa L. Rev. 637, 659-63 (1980) ("a legislative act or state constitutional provision presumably sets the requirement [for the number of signatures necessary to place an initiative on the ballot] sufficiently high to limit the plebescite's use to matters in which interest is sufficiently great to justify a check on the representative lawmakers"). Further, as noted above, the validity of the required number of signatures can be reviewed in State administrative and judicial proceedings questioning the signatures.

D.

There remain two further arguments made by Judge Logan's dissent which we should consider.

First, it is said that the Colorado statute's interference with First Amendment rights is minimal since the Constitution does not require states to provide their citizens with an initiative procedure. We disagree. It is true that the United States Constitution does not confer the right to use the initiative procedure. *See Kelly v. Macon-Bibb County Board of Elections*, 608 F. Supp. 1036, 1038-39 & n.1 (M.D. Ga. 1985); *Georges v. Carney*, 546 F. Supp. 469, 476 (N.D. Ill.), *aff'd*, 691 F.2d 297 (7th Cir. 1982). *But cf. Diaz v. Board of County Commissioners*, 502 F. Supp. 190, 193 (S.D. Fla. 1980) (initiative procedure is one means of preserving citizens' "unquestioned right to petition their governments for redress of what they believe are grienvances").[14] Nonetheless, we do not think that Colorado's constitutional choice to reserve the initiative for the people leaves the State free to condition its use by impermissible restraints on First Amendment activity. As one court explained: "[A]lthough the right to place a question on the ballot is not fundamental in Illinois, the legislature has seen fit to confer such right. Once Illinois decided to extend this forum, it became obligated to do so in a manner consistent with the Constitution." *Georges v. Carney*, 546 F. Supp. at 476-77. The dissent's argument fails as has the discredited rationale for rejecting Government employees' constitutional claims on the notion that there is no "constitutional right to government employment." *Slochower v. Board of Higher Education*, 350 U.S. 551, 555 (1956); *see also Barsky v. Board of Regents*, 347 U.S. 442, 473 (1954) (Douglas, J., dissenting) ("the question here is not what government must give, but rather what it may not take away").

In the same vein Judge Logan's dissent relies on the reasoning in *Posadas de Puerto Rico Associates v. Tourism Co. of Puerto Rico*, 54 U.S.L.W. 4956, 4961 (U.S. July 1, 1986), that "the greater power to completely ban casino gambling necessarily includes the lesser power to ban

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[14] We note that in Colorado the right to the initiative is not a matter of legislative grace but a right reserved by the people in the State constitution. Colo. Const. art. II, §§ 1, 2 & art. V, § 1; *In re Proposed Initiative Concerning Drinking Age in Colorado*, 691 P.2d 1127, 1130 (Colo. 1984); *Urevich v. Woodard*, 667 P.2d 760, 762 (Colo. 1983). The Colorado courts have treated the initiative as "a fundamental right at the very core of our republican form of government," and "viewed with the closest scrutiny any governmental action that has the effect of curtailing its exercise." *McKee v. City of Louisville*, 616 P.2d 969, 972 (Colo. 1980).

advertising of casino gambling . . .'' Hence the argument is made that the power to withhold the initiative process entirely includes the power to impose the restriction on its exercise in Colorado. The references to greater and lesser powers to restrict activities ''deemed harmful'' and ''the stimulation of demand'' for them, *id.* at 4961, are not logically applicable here. The valid question raised by such reliance on *Posadas* is whether the power to ban casino gambling entirely would include the power to ban public discussion of legislative proposals regarding the legalization and advertising of casino gambling. We are convinced that the answer to that question must be in the negative.

The proposition that activities ''deemed harmful'' by a state can sometimes be regulated to minimize their harmful effects without violating the First Amendment does not save the restrictive Colorado statute in question here. *See, e.g., Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976) (upholding local zoning ordinances prohibiting adult theatres from being located within 1,000 feet of each other); *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490 (1981) (upholding regulation of billboards containing commercial messages but declaring unconstitutional regulations as they related to non commercial speech). Such regulations are a far cry from restrictions on public discussion of legislative proposals concerning state regulatory policy.

In addition, *Posadas* is inapplicable to the present case for a more fundamental reason—the speech restricted in *Posadas* was merely ''commercial speech which does 'no more than propose a commercial transaction . . . .' ''

Posadas, 54 U.S.L.W. at 4959 (quoting *Virginia Pharmacy Board v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 762 (1976)). The Supreme Court has ''consistently distinguished between the constitutional protection allowed commercial as opposed to noncommercial speech.'' *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 504-05 (1981). ''The Constitution 'accords less protection to commercial speech than to other constitutionally safeguarded forms of expression.' '' *Posadas,* 54 U.S.L.W. at 4962 (Brennan, J., dissenting) (quoting *Bolger v. Young Drug Products Corp.,* 463 U.S. 60, 64-65 (1983)). *Accord Central Hudson Gas & Electric Corp. v. Public Service Comm'n,* 447 U.S. 557, 562-63 (1980). Here, by contrast, the speech at issue is ''at the core of our electoral process and of the First Amendment freedoms.'' *Buckley,* 424 U.S. at 39, 96 S.Ct. at 644 (quoting *Williams v. Rhodes,* 393 U.S. 23, 32, 89 S.Ct. 5, 11, 21 L.Ed.2d 24 (1968)—an area of public policy where protection of robust discussion is at its zenith.

Second, Judge Logan argues in dissent that the ''speech by proxy'' doctrine makes strict scrutiny inappropriate in this case. The opinion of the district judge likewise reasoned that the contributor was paying someone else to speak and thus the contributor's speech was not restricted. 741 F.2d at 1212. We note that the Court in *Buckley* did say that ''[w]hile contributions may result in political expression if spent by a candidate or an association to present views to the voters, the transformation of contributions into political debate involves speech by someone other than the contributor.'' 424 U.S. at 21. Four members of the Court later extended this principle in upholding a $5000 limit on the amount an unincorporated association could contribute to a multicandidate political

committee. *California Medical Association v. Federal Election Commission,* 453 U.S. 182, 196-97 (1981) (plurality). However, the Court later refused to apply the "speech by proxy" concept in *Federal Election Commission v. National Conservative Political Action Committee.* 470 U.S. 480 (1985). There the Court held that a $1000 limitation on campaign expenditures by independent political committees was in violation of the First Amendment. *Id.* at 497-98. The Court gave forceful reasons for its refusal to use the "speech by proxy" analysis:

> Unlike *California Medical Assn.,* the present case involves limitations on expenditures by PACs, not on the contributions they receive; and in any event these contributions are predominantly small and thus do not raise the same concerns as the sizeable contributions involved in *California Medical Assn.*
>
> Another reason the "proxy speech" approach is not useful in this case is that the contributors obviously like the message they are hearing from these organizations and want to add their voices to that message; otherwise they would not part with their money. To say that their collective action in pooling their resources to amplify their voices is not entitled to full First Amendment protection would subordinate the voices of those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources.

Id. at 495.

We think that *Federal Election Commission* compels a similar refusal to use the "speech by proxy" analysis here. It is the plaintiffs' expenditures, not contributions to them, which are limited. These expenditures advance the plaintiffs' own political expression for the ballot measure, a right of communication given constitutional protection. As the Court said in *Citizens Against Rent Control*: "Contributions by individuals to support concerted action by a committee advocating a position on a ballot measure is beyond question a very significant form of political expression." 454 U.S. at 298.

Thus the reasoning of the dissent, which seeks to escape the strict scrutiny test for First Amendment restrictions, does not withstand analysis and that test must be followed as in *Bellotti* and *Citizens Against Rent Control.* And for reasons stated earlier, the Colorado restriction on First Amendment rights does not withstand strict scrutiny.

IV

We are further persuaded by the analysis of other courts which have generally struck down similar restrictions on the payment of petition circulators as violative of the First and Fourteenth Amendments.

It is true that in *State v. Conifer Enterprises, Inc.,* 508 P.2d 149 (Wash. 1973), the Washington Supreme Court held that a Washington statute prohibiting payment of petition circulators did not violate the First Amendment. However, that decision preceded *Buckley* and was based on the Washington Court's finding that while the solicitation of signatures on an initiative petition is political expression protected by the First Amendment, there is no necessary relationship between the payment of circulators and the exercise of that right. *Id.* at 153. *Buckley* rejected this theory, stating that

> [a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed,

> the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money.

424 U.S. at 19 (footnote omitted).

In *Libertarian Party of Oregon v. Paulus*, Civ. No. 82-521FR, slip op; (D. Ore. Sept. 3, 1982), the federal district court relied on primarily on *Buckley* in striking down, on First Amendment grounds, an Oregon statute prohibiting payment to petition circulators. The court held that the statute restricted political speech because obtaining signatures on a nominating petition required the circulator to explain the candidate's views on political issues.

In *Hardie v. Fong Eu*, 556 P.2d 301 (1976), *cert. denied*, 430 U.S. 969 (1977), the California Supreme Court similarly held that a statute limiting the amount that could be spent on the circulation of petitions was unconstitutional. The court relied on *Buckley* and particularly its recognition that virtually every means of political communication in modern society requires or involves the expenditure of money. *Id.* at 303.

More recently, the federal district court for the District of Maryland invalidated a state statute like that of Colorado. *Ficker v. Montgomery County Board of Elections*, No. R-85-4365, slip op. (D. Md. Dec. 23, 1985). The court concluded that the statute restricts the discussion of ballot issues and the size of the audience that can be reached. *Id.* at 4-6. The court held that this restriction on political expression could not be justified.

The federal district court for the District of Columbia also invalidated a statute prohibiting payment to circulators of initiative petitions, reasoning that the restriction on First Amendment interests was not justified by the legislative findings or record evidence. *D.C. Committee on Legalized Gambling v. Rauh*, No. 79-3296, slip op. at 2 (D.D.C. Dec. 21, 1979).

Thus persuasive precedents since *Buckley* reject the efforts to restrict First Amendment rights by means like those employed by the Colorado statute.

V

In sum, we conclude that Colo. Rev. Stat. § 1-40-110 unconstitutionaily imposes a direct and substantial restriction on plaintiffs' right to political speech, employing unnecessarily broad prohibitions. In the area of free expression "[p]recision of regulation must be the touchstone . . . ." *NAACP v. Button*, 371 U.S. 415, 438 (1963). We hold that the ban on payment of petition circulators in the Colorado statute violates the First and Fourteenth Amendments. Accordingly the judgment is reversed and the case is remanded to the district court for entry of an appropriate declaratory judgment.

No. 84-1949—GRANT, et al v. MEYER, et al.

BARRETT, Circuit Judge, dissenting:

I respectfuly dissent for the reasons set forth in the district court's memorandum and this court's *per curiam* opinion (Holloway, Circuit Judge, dissenting) entitled *Grant v. Meyer*, 741 F.2d 1210 (10th Cir. 1984).

I do not view the Colorado statute as a burden on First Amendment rights. Further, I believe that the statute here considered, i.e., Sect. 1-40-110 C.R.S. (1980) which

prohibits payment of initiative petition circulators, is fully justified in protecting the integrity of Colorado's initiative process.

No. 84-1949, GRANT, et al. v. MEYER, et al.

LOGAN, Circuit Judge, dissenting:

I agree that this appeal should be considered on the merits. And if I could agree with the implicit assumptions of the majority opinion in its discussion of the merits, I would be persuaded by it. But the majority treats this as a pure "speech" case, thereby invoking exacting scrutiny as the standard of review. The majority sees no distinction between restricting use of the initiative and limiting expenditures to support or oppose candidates or measures already on the ballot. The majority rejects applicability of the "speech by proxy" standard of review, and it finds Colorado's interest in denying use of paid petition circulators insufficient to uphold the legislation. I disagree with all of these assumptions and findings.

I

First, the statute at issue implicates First Amendment rights but proscribes only conduct. The statute does not prohibit citizens from spending their money in any way to express their views on a public issue on the ballot, including an initiative proposition after it has met the statutory requirements to appear on the ballot. The statute does not prohibit citizens from spending any amount of money or from associating to express their views on any public issue, including one they would like to see on an

initiative ballot. Although it does prohibit paying someone for circulating an initiative petition or for signing it, the statute in no other way prohibits anyone from paying others to espouse their views to people whom they hope will sign an initiative petition. For example, it was reported that, in the 1982 Colorado initiative to allow grocery stores to sell wine, "substantial sums [were] spent to organize and advertise a petition drive, while avoiding actual payment to circulators." The Initiative News Report, vol. IV, no. 3, at 2 (Feb. 11, 1983).

The majority treats the obtaining of signatures by paid petition circulators as inseparable from the dissemination of political ideas through such individuals. This is clearly not the case. Under the statute as written, it would be perfectly legal for plaintiff's paid representatives to "approach[ ] a stranger, ask[ ] him if he is a registered voter, and, if the person is willing to listen, advance[ ] arguments why the petition should be placed on the ballot." Slip op. at 13-14. They are simply forbidden to take the final step of obtaining the listener's signature. It is thus conduct, not speech, that Colorado seeks to regulate. " '[I]t has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.' " *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Only because the majority opinion incorrectly characterizes the statute as directly restricting unalloyed political expression is it able to insist on the standard of

strict or exact scrutiny, which the majority concedes is given only to "limitations on core First Amendment rights of political expression." Slip. op. at 17.[1] The standard for speech intermingled with activity is a more flexible one. "[W]here speech and conduct are joined in a single course of action, the First Amendment values must be balanced against competing societal interests." *City of Los Angeles v. Preferred Communications, Inc.*, 54 U.S. L.W. 4542, 4544 (U.S. June 2, 1986).

The First Amendment forbids the government from regulating speech in ways "that favor some viewpoints or ideas at the expense of others." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984). This statute does not violate that precept. It displays no bias against ideas or censorship. In *Members*, the Supreme Court upheld a municipal ordinance that prohibited posting signs on public property against a political candidate's claim it violated his First Amendment rights. There the Court said:

> "While the First Amendment does not guarantee the right to employ every conceivable method of communication at all times and in all places, . . . a restriction on expressive activity may be invalid if the remaining modes of communication are inadequate.

[1] Whether the Colorado state courts have used strict scrutiny to review governmental actions affecting the initiative, as the majority opinion suggests at 21 n.14, is relevant, if correct, only to whether this statute is compatible with the *state* constitution. That question is not before us. Nor is there any question here of constitutional due process or equal protection that would warrant or at least account for the majority's invocation of employee discharge cases. The only question before us is whether this statute is incompatible with First Amendment free speech guarantees of the United States Constitution.

> . . . The Los Angeles ordinance does not affect any individual's freedom to exercise the right to speak and to distribute literature in the same place where the posting of signs on public property is prohibited. To the extent that the posting of signs on public property has advantages over these forms of expression, . . . there is no reason to believe that these same advantages cannot be obtained through other means. To the contrary, the findings of the District Court indicate that there are ample alternative modes of communication in Los Angeles. Notwithstanding appellees' general assertions in their brief concerning the utility of political posters, nothing in the findings indicates that the posting of political posters on public property is a uniquely valuable or important mode of communication, or that appellees' ability to communicate effectively is threatened by ever-increasing restrictions on expression."

Id. at 812 (citations and footnotes omitted). The case at bar fits that analysis.

The state has justified its limitation on paid solicitors by asserting its interest in ensuring that any initiative placed on the ballot has broad popular support.[2] As Justice

[2] The state also seeks to support the constitutionality of the legislation by arguing that petition solicitors are in a sense election judges, and unpaid volunteers are somehow more trustworthy and dependable than paid solicitors. I agree with the majority that the argument is wholly unconvincing. Neither the unpaid volunteer nor the paid solicitor is likely to violate a statute that makes it a felony to falsify signatures or otherwise breach the integrity of the petitions. An overzealous volunteer would in fact seem more likely to overstate supporting arguments for the proposition than the paid solicitor, and both are likely to use friendship or other appeals irrelevant to the merits to obtain signatures. Further, those who sign the petitions do not represent that they will vote for the proposition that is the subject of the initiative or express any opinion other than their willingness to have the proposition appear on the ballot.

White noted regarding the role of the initiative in California, it "cannot be separated from its purpose of preventing the dominance of special interests." *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 311 (1981) (White, J., dissenting). The state thus has a legitimate interest in using the initiative only as a safety valve against widespread unrest, and thereby ensuring that this alternative to legislative action is used only when it has the earmarks of populist movement.

Colorado has presented empirical data which compared initiatives proposed through workers paid to circulate petitions with those proposed through volunteer solicitors. Initiatives proposed through volunteer petitioners had a much greater chance of adoption. A state exhibit indicated that the voters adopted forty-eight percent of the initiatives circulated by volunteers, whereas they adopted only twenty-four percent of those using paid solicitors. The Initiative News Report, vol. IV, no. 3, at 2 (Feb. 11, 1983). Common sense tells me the same thing: A proposition for which large numbers of volunteers come forward to solicit the necessary signatures is more likely to have widespread popular support, and hence ballot appeal, than a proposition that requires paid workers to obtain the necessary signatures. The majority's recital of what paid solicitors can do to enhance the possibility of a successful drive to put a proposition on the ballot, *see* slip op. at 14-16, only increases my conviction that if enough money is spent the original "safety valve" purposes of the initiative would be thwarted.

In a recent publication, a former General Counsel of the U.S. House of Representatives Committee on the Judiciary wrote,

> "Common Cause says if you hire the right people you can qualify anything for the ballot. In California, there are a dozen initiative-circulating consulting firms—the 'initiative industry'—that are now branching out into other states. What was originally, [sic] designed to be a volunteer or citizens' effort, which grew out of a progressive era in the West, has become a slick and professional industry."

Parker, *Washington Focus*. Trial, Aug. 1987 at 17.

The state has ample justification, in my view, for any minor encroachment on First Amendment rights that might be involved in this state enactment. *Cf. Hall v. Simcox*, 766 F.2d 1171, 1177 (7th Cir.) (state can limit access to ballot in order to fulfill its electoral purpose), *cert. denied*, 106 S. Ct. 528 (1985).

II

There is another flaw in the majority's analysis. The federal Constitution provides no individual citizen with the right to the initiative—the right to commence a procedure through which a proposed constitutional or other change in the law can be placed upon a state or federal ballot. *See Georges v. Carney*, 691 F.2d 297, 300 (7th Cir. 1982); L. Tribe, *American Constitutional Law* § 13-17 (1978). The initiative is a state-created procedure, which originated in the populist movement as a device to permit more direct citizen input. Less than half of the states provide, by constitution or statute, for this type of direct democracy.

Thus Colorado would not violate the federal Constitution if it prohibited the initiative entirely. It could deny its citizens any method, other than action through their elected representatives, to amend the state constitution or to adopt new laws. Because the state need not allow the

initiative at all, surely it can place reasonable restrictions on its use. For example, it could require, instead of a total of signatures equal to five percent of those who last voted for secretary of state, a total equal to twenty-five percent, fifty percent, or even one hundred percent of such voters. The state need only act uniformly toward all who would use the process it allowed. *Cf. Gordon v. Lance,* 403 U.S. 1 (1971) (upholding sixty percent vote requirement in referendum on incurring bond indebtedness).

Colorado has legislated in an area reserved to it—the initiative is not among the rights which the federal constitution explicitly protects—and in a manner, as discussed in part I, that only minimally interferes with First Amendment rights. Viewed from this perspective, this case seems analogous to the case recently before the Supreme Court, *Posadas de Puerto Rico Associates v. Tourism Company of Puerto Rico,* 54 U.S.L.W. 4956 (U.S. July 1, 1986). There the Court upheld the validity of a Puerto Rican statute that restricted advertising aimed at residents while permitting advertising aimed at nonresidents. The Court acknowledged that it was dealing with a First Amendment issue, albeit commercial speech, but based its opinion upholding the restriction on the power of Puerto Rico to prohibit casino gambling altogether. "In our view, the greater power to completely ban casino gambling necessarily includes the lesser power to ban advertising of casino gambling, and *Carey* [*v. Population Services Int'l,* 431 U.S. 678 (1977)] and *Bigelow* [*v. Virginia,* 421 U.S. 809 (1975)] are hence inapposite." 54 U.S.L.W. at 4961.

There also the appellant made the related argument, like that made by the majority in the instant case, that

having chosen to permit gambling for residents the First Amendment prohibits the legislature from using restrictions that touch on speech to accomplish its goal of controlling access. The Supreme Court answered that argument as follows:

> "[I]t is precisely *because* the government could have enacted a wholesale prohibition of the underlying conduct that it is permissible for the government to take the less intrusive step of allowing the conduct, but reducing the demand through restrictions on advertising. It would surely be a Pyrrhic victory for casino owners such as appellant to gain recognition of a First Amendment right to advertise their casinos to the residents of Puerto Rico, only to thereby force the legislature into banning casino gambling by residents altogether. It would just as surely be a strange constitutional doctrine which would concede to the legislature the authority to totally ban a product or activity, but deny to the legislature the authority to forbid the stimulation of demand for the product or activity through advertising on behalf of those who would profit from such increased demand."

Id. (emphasis in original).

I agree with the majority that a state which chooses to create a right may not take it away without providing the procedural due process guarantees of the federal Constitution. But the instant statute does not deny procedural due process. The limitation here is in the definition of the right. Suppose, for example, the statute provided that initiative petitions could not be circulated at all, but must be posted in designated public places where registered voters could come to and sign. I dare say we would not find such a law would violate First Amendment rights. I see no principled difference in the law at issue here.

III

Even if we focus exclusively on the speech component of the petition circulating activity before us here, that speech is most analogous to the "speech by proxy" achieved through contributions to a political campaign committee. Such speech is not appropriately reviewed under a strict or exacting scrutiny standard. Just as contributors to a campaign committee depend on others to espouse their political views for them, the hirers of petition circulators depend on paid circulators to decide what "pitch" to use to obtain signatures. Justice Marshall stated in *Citizens Against Rent Control*, 454 U.S. at 301:

> "this Court has *always* drawn a distinction between restrictions on contributions, and direct limitations on the amount an individual can expend for his own speech. As we noted last term in *California Medical Assn. v. FEC*, 453 U.S. 182, 196 (1980) (MARSHALL, J., joined by BRENNAN, WHITE, and STEVENS, JJ.), the 'speech by proxy' that is achieved through contributions to a political campaign committee 'is not the sort of political advocacy that this Court in *Buckley* found entitled to full First Amendment protection.' "

(Marshall, J., concurring in the judgment).[3]

In a case challenging federal regulation of corporate and labor union solicitation practices on equal protection and First Amendment grounds, the District of Columbia Circuit stated:

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[3] Although the "speech by proxy" doctrine has never been endorsed explicitly by a majority of the Supreme Court, it continues to receive attention in Court opinions. See *FEC v. National Conservative Political Action Comm.*, 470 U.S. 480, 494-95 (1985).

> "While heightened scrutiny often attends a legislative classification alleged to impinge on First Amendment interests, we reject plaintiffs' argument that the most stringent review standard should apply in this case. Decisions in point may lack perfect consistency and crystal clarity, but they do reveal that the nature and quality of the legislative action determine the intensity of judicial review of intertwined equal protection, First Amendment claims.
>
> . . .
>
> *Mosley* itself enunciated review standards that were not the most exacting, and *Buckley v. Valeo* drew distinctions bearing on the rigorousness of review based on the character of the several legislative proscriptions the Court scrutinized. . . . We are therefore confident that the matter before us does not call for a review standard more demanding than this elevated, but not strictest, test: the challenged legislative action must bear a substantial relation to an important governmental interest."
>
> *International Association of Machinists and Aerospace Workers v. FEC*, 678 F.2d 1092, 1105-06 (D.C. Cir.) (footnotes and citations omitted), *aff'd mem.*, 459 U.S. 983 (1982). Therefore, it is clear that not in all situations do First Amendment concerns require strict scrutiny. If less than strict scrutiny applies to the case before us, we must uphold the constitutional validity of the statute.

But even if we do apply strict or exacting scrutiny, *see Citizens Against Rent Control*, 454 U.S. at 298, I believe the Colorado statute should be upheld. Despite the undisputed burden that ballot restrictions in candidate cases have had on First Amendment rights, such restrictions frequently withstand strict scrutiny. *See Anderson v. Celebrezze*, 460 U.S. 780, 788 & n.9 (1983). Most often

courts find that these limited restrictions are necessary to protect the integrity of the electoral process. *Id.* Professor Tribe explains:

> "Whatever its doctrinal roots, there is a principle to be distilled from *American Party* [*v. White*, 415 U.S. 767 (1984)] and *Storer* [*v. Brown*, 415 U.S. 724 (1974)]: in order to keep ballots manageable and protect the integrity of the electoral process, states may condition access to the ballot upon the demonstration of a 'significant, measurable quantum of community support,' but cannot require so large a demonstration of support that minority parties or independent candidates have no real chance of obtaining ballot positions . . . . In appraising the collective burden imposed by access requirements, one must place substantial weight on empirical evidence demonstrating how often minority parties and independent candidates have actually been able to satisfy them."

L. Tribe, § 13-20, at 783-84 (footnotes omitted). Just as placing too many candidates on a ballot wastes state resources and confuses voters, so does placing numerous initiatives on a ballot. *See Anderson*, 460 U.S. at 788 n.9. In my view, the state has used the least restrictive measure to achieve its justifiable goal of insuring there is widespread popular support for any initiative proposition it allows on the ballot. Therefore, I would affirm the district court's decision.

7-31-84 84-1949

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

SLIP OPINION

(Filed July 31, 1984)

PUBLISH

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON and COLORADANS FOR FREE ENTERPRISES, INC.,

Plaintiffs-Appellants,

v.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Defendants-Appellees.

No. 84-1949

Appeal from the United States District Court
For the District of Colorado

(D.C. No. 84-JM-1207)

William C. Danks, Denver, Colorado, for Plaintiffs-Appellants.

Ruthanne Gartland, Assistant Attorney General, Denver Colorado (Duane Woodard, Attorney General, Charles B. Howe, Chief Deputy Attorney General, Richard H. Forman, Solicitor General, Denver, Colorado, with her on the brief) for Defendants-Appellees.

HOLLOWAY, BARRETT and DOYLE, Circuit Judges.

PER CURIAM.

This appeal by plaintiffs-appellants involves a challenge to the constitutionality, under the First and Fourteenth Amendments, of Section 1-40-110 C.R.S. (1980), which prohibits payment of initiative petition circulators and provides criminal sanctions for violation of the statute. We consolidated consideration of a motion by plaintiffs for an injunction pending appeal with the merits, accelerated the appeal, heard argument on the merits, and have considered the briefs of the parties on the merits and the motion.

The court concludes that the judgment of the district court upholding the statute should be, and it is affirmed, and the motion for an injunction is denied. Judge Holloway dissents. The dissenting opinion is attached following the majority opinion.

Judges Barrett and Doyle have adopted the opinion of the United States District Court for the District of

Colorado filed July 3, 1984 in the captioned cause as the majority opinion of the Court. A copy of the order setting forth the opinion of United States District Judge John P. Moore is attached hereto and is incorporated herein by reference.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-JM-1207

PAUL K. GRANT, et al.,

Plaintiffs,

vs.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, et al.,

Defendants.

ORDER

(Filed July 3, 1984)

THIS MATTER is before me on a complaint seeking injunctive and declaratory relief. At issue is whether a statute of the state of Colorado prohibiting payment of persons circulating petitions proposing a constitutional amendment violates the plaintiffs' rights to free speech. Jurisdiction is asserted upon 28 U.S.C. §§ 1331 and 1343 (a)(3).

The plaintiffs in this case are interested in the adoption of an amendment to the constitution of the state of Colorado that would remove motor carriers from the jurisdiction of the state Public Utilities Commission. In accordance with provisions of the state law, they have qualified the issue for submission to the registered electors of Colorado; however, before the question can be placed upon the November ballot, the proponents must obtain signatures of 46,737 registered electors upon petitions supporting the measure. They now claim that their ability to achieve this goal would be enhanced if they could employ persons to circulate these petitions, yet they are faced with

Colo. Rev. Stat. § 1-40-110, which prohibits and makes criminal the payment of any consideration for the circulation of petitions.

Plaintiffs further claim that part of the process of obtaining the signature of electors is the communication to those persons of the merits of the issue. They indicate it is often necessary to educate and argue with potential petition signers to convince them the issue is one which should be considered by the general electorate. Thus, they believe the communication inherent in the petitioning process is political expression, hence protected speech. Upon this predicate, plaintiffs argue that Colo. Rev. Stat. § 1-40-110 inhibits their protected right because it prevents them from hiring persons to help in the dissemination of their beliefs. In support of their argument, they rely principally upon *Buckley v. Valeo,* 424 U.S. 1 (1976); *Hardie v. Fong Eu,* 556 P.2d 301 (Cal. 1976); and two unpublished United States District Court opinions from the District of Oregon and the District of Columbia. I find these cases either inapposite or unpersuasive.

Evidence taken in support of the complaint indicates the plaintiffs' accord that money is a basic motivating factor in obtaining the service of persons to carry public petitions. Each of those plaintiffs who testified indicated that payment for their own time spent in circulating petitions would be welcome, and payment of others to take their places on the hustings would free them for other endeavors. Indeed, one testified that payment of circulators would permit him to spend more lucrative time in pursuit of his profession.

At the same time, the evidence did not indicate that plaintiffs were prevented in any way from espousing their cause simply because they could not obtain paid petition circulators. At best, the evidence indicates plaintiffs' purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers.

Thus, a threshold question is raised. Does the statute in question constitute a restraint upon the *plaintiffs'* right to free speech? Remembering that the right asserted here is the right to articulate a political belief to others in face-to-face confrontations over a petition for an initiated constitutional amendment, one must first ask whether the statute imposes a burden on that right.

In some of the cases relied upon by plaintiffs, it is apparently assumed that the burden exists. Yet, I question whether the individual right of any of the plaintiffs is affected by this statute. In order to cross the first threshold, one must find that plaintiffs' rights to political elocution have been restricted because they cannot pay someone else to speak. As I understand the contention, it is not that plaintiffs desire to pay for the dissemination of their political position, as one would do in political advertising, but that they desire to pay someone else to speak upon a subject which plaintiffs support. Thus viewed, the question arises as to whose rights of speech are involved. Can plaintiffs claim their rights to free speech have been invaded because someone else cannot be paid to speak? Does the statute in question suppress communications? Is this situation akin to the restriction of campaign contributions upheld by the court in *Buckley v. Valeo, supra?*

In *Buckley,* the court contrasted the first amendment ramifications of limitations on political contributions to those on political expenditures. The court noted in present society the expenditure of money is a necessary ingredient in effective political speech; therefore, any restriction on expenditures resulting in a suppression of political speech was in conflict with the first amendment. Hence, the effort to restrict the amount one could spend on a political campaign had to result in an unconstitutional restriction on protected communication.

In contrast, the court found a limitation on contributions to political campaigns was not constitutionally abhorrent. Because any contribution is nothing more than a generalized expression of support for a candidate or a view, the court concluded a contribution was not the same as a communication of political thought; hence contributions could be restricted.

Here we must remember, the advocates of the plaintiffs' proposed constitutional amendment are not restricted in the personal communication of their belief in the proposition in any way but arguably by Colo. Rev. Stat. § 1-40-110. Indeed, their ability to spend money on every other form of thought-dissemination is totally unfettered. While they have testified they would *prefer* to be able to spend money to hire circulators rather than to buy advertising, the test of constitutionality does not lie in their preferences. One must ask whether their personal rights of speech are transgressed by a restriction which only limits their ability to pay someone else to speak. Within the limited framework of this case, I believe the answer is no.

In light of the unlimited possibilities plaintiffs have to publicize their belief in their proposed measure, I am persuaded the statute in question is not a burden on their first amendment right. It seems to me, the limitation imposed by Colo. Rev. Stat. § 1-40-110 restricts only a generalized support for a political thought, much like the contribution of money was regarded in *Buckley, supra.* Thus, when the statute is placed in this perspective, it does not appear constitutionally onerous.

Yet, assuming for the sake of argument that this statute in some way could affect the plaintiffs' personal rights to politica... speech, have they shown the existence of such an effect? I conclude they have not. The evidence submitted by the plaintiffs consisted principally in their assertion the payment of petition circulators would facilitate the circulation of petitions. As previously indicated, they did not establish any adverse effect upon *their* ability to communicate arising out of the statute.

By contrast, the defendants have proved some provocative historical data from Colorado. This data shows advocates of initiated measures in this state have as much success in getting ballot position for their measures as do citizens in states in which petition circulators can be paid. (*See* defendants' ex. E.) Statistical data from the District of Columbia and the 23 states whose laws permit the initiative process indicate that since the process was adopted in Colorado in 1910, this state ranks fourth in the total number of initiatives placed upon the ballot. This is so despite the fact that 20 other states and the District of Columbia permit the payment of petition circulators. The evidence also establishes that Colorado's requirements for placing

initiated measures upon the ballot are about the least restrictive of any state. These facts tell me the prohibition against payment of circulators is in reality no inhibition.

Finally, in light of this data, we must consider whether the state interest to be achieved by the statute is sufficiently compelling to withstand a first amendment attack. The defendants' evidence indicates the initiative process got its start in the west as a "grassroots" means of protecting citizens from overpowering special interest groups whose financial strength was used to manipulate state legislators. Through initiated legislation, citizens were able to enact measures for the benefit of the populace as a whole. Indeed, this form of government has assumed an almost sacrosanct position in the role of individual rights in many states.[1] Therefore, Colorado asserts a compelling interest in protecting the integrity of the process and in insuring any initiated measure has a sufficiently broad base on support to assure its validity for public consideration.[2]

While plaintiffs' thrust at the question of state interest is aimed at the potential for illegal acts upon the part of paid circulators, that does not seem to be of significant concern to defendants. Indeed, the state has not suggested paid circulators would be persuaded to violate the law simply because they were paid. Its articulated concern is

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1 For a more detailed exposition of the right of initiative in Colorado, see *Colorado Project-Common Cause v. Anderson,* 178 Colo. 1, 495 P.2d 220.

2 Plaintiffs have asserted the compelling interest of the state is in preventing fraud in the process, but that is not the state's position at all.

that people may be persuaded to sign petitions for reasons other than the political validity of the cause espoused.

In line with that concern, plaintiff Grant has supplied some substance. He indicated during the course of his testimony how difficult it was to obtain petition signatures. In his experience, he was often unable to get people to listen long enough for him to communicate the benefits of the proposed constitutional amendment. Yet, on one occasion, he found that people were more willing to sign his petition because it was his birthday than they were to sign because they believed in the importance of his cause. He also indicated that in his experience in the state of Florida, a place where circulators can be paid, he encountered circulators of a petition he supported who padded the petitions with names taken from the telephone book. While he stated those petitions were not submitted when the padding was discovered, I would nonetheless assume the circulators were motivated to this endeavor by the money they received for each signature obtained.

This testimony leads directly to the state's purpose of protecting the integrity of the process. The evidence has established under Colorado law, all petition signatures have presumed validity, and no effort is made, as in most states, to independently verify the validity of signatures except upon the filing of written objections. Thus, in order to retain the facility with which initiated measures are qualified for the ballot and to protect the validity of petitions, Colorado does have an interest in eliminating a temptation to pad petitions which transcends the remedy of making such padding a criminal offense.

As I presently view the situation, the elimination of the temptation to pad is an exchange for the presumption of validity which attaches to petitions. Any change in one would have to have an effect upon the other. Thus, I do not believe the existence of a criminal sanction against subscribing false signatures to a petition is an equivalent and less onerous response to the padding of petitions than the device of eliminating the temptation to do so.

While it is of perhaps less significance, it cannot be gainsaid that the testimony of Mr. Grant lends credence to the state's contention paid circulators, who are really sales persons paid on the basis of results, would be persuaded to use techniques of salesmanship which are not inherently illegal just to enhance their own compensation. Indeed, if persons were persuaded to sign Mr. Grant's petition simply because it was his birthday, it takes only a minor stretch of the imagination to conjure possibilities of circulators obtaining signatures because of any other persuasive tactic resulting from the fertile mind of an expert salesman.

In short, I take seriously the state's argument it has an interest in protecting the integrity of the initiative process. I look upon the other expressed state interest in like manner.

The state's evidence of the history and limitations of the initiative process lends ample credence to its assertion that there is a significant need to insure any measure has a substantial base of support before it is submitted to the electorate. The state's expert pointed out the process of initiative is more rigid in practice than the process of qualifying a candidate for the ballot by petition. That is,

an initiated measure is drafted, submitted to state officers for review, comment, and selection of a ballot title, and then presented to the public. Thereafter, the measure cannot be changed in any way. Thus, the electorate is put to the difficult test of whether the measure in its submitted form should be cast into the stone of the constitution or laws of the state. The difficulty arises from the fact that unlike the legislative process existing in the General Assembly, where the process of debate can readily point out mistakes in draftsmanship or concept and where those mistakes can be easily changed, the legislative process of initiative is rigid, and no alterations can be accomplished. Thus, the state has an interest in seeing that any measure has significant support to insure only the better reasoned and drafted measures are given the chance of adoption. *See Citizens Against Legalized Gambling v. District of Columbia Board of Elections and Ethics*, 501 F. Supp. 786 (D.C. 1980).

The rigidity of the initiative process makes it a significantly different process from that employed in placing individual candidates on the ballot for consideration by the electorate. For that reason, I wish to be clearly understood that my conclusion in this case is restricted to the process of petition circulation of initiated measures. Whether the same state interests exist, or whether the same first amendment considerations apply to the payment of circulators of petitions for candidates, is a matter I have not considered, yet it is one which must not be confused with the matter before me now.

One final consideration should be made. Plaintiffs have relied in part upon *Urevich v. Woodard*, 667 P.2d 760 (Colo. 1983). That case is clearly inapposite, but it does

point out another distinction which must be drawn. Even though *Urevich* pertains to the same statute before me in this case, its result is predicated upon the right of initiative found in the Colorado constitution, and not the first amendment. As previously noted, Colorado regards the right of initiative as the "most important right reserved to [the electors] by the constitution." *Colorado Project-Common Cause v. Anderson*, 495 P.2d at 221. Thus, whether, Colo. Rev. Stat. § 1-40-110 would meet the test of Colo. Const., art. II, § 1, were it to be considered in a state court is a matter upon which I do not speculate.

On the basis of the foregoing, which shall constitute my findings and conclusions in this matter, it clearly appears to me plaintiffs have failed to demonstrate their entitlement to relief. Accordingly, it is

ORDERED judgment enter in favor of defendants and against plaintiffs. Defendants shall be awarded their costs upon the filing of a proper bill of costs within ten days of the entry of judgment.

DATED at Denver, Colorado, this 3rd day of July, 1984.

BY THE COURT:

/s/ John P. Moore, Judge
United States District Court

(Signature page of order in *Grant v. Meyer*, No. 84-JM-1207.)

ENTERED ON THE DOCKET
JULY 5, 1984

James P. Manspeaker
Clerk

By.....

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-JM-1207

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISES, INC., a Colorado corporation,

Plaintiffs,

vs.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Defendants.

JUDGMENT

(Filed July 5, 1984)

Pursuant to and in accordance with the order entered by The Honorable John P. Moore, United States District Judge, on July 3, 1984, it is

ORDERED that judgment is entered in favor of the defendants, Natalie Meyer and Duane Woodard, and against the plaintiffs, Paul K. Grant, Edward Hoskins, Nancy P. Bigbee, Lori A. Massie, Ralph R. Harrison and Coloradans for Free Enterprises, Inc.

FURTHER ORDERED defendants shall have their costs upon the filing of a bill of costs within ten days of the entry of this judgment.

FURTHER ORDERED the action is dismissed.

DATED at Denver, Colorado, this 5th day of July, 1984.

FOR THE COURT:

JAMES R. MANSPEAKER, CLERK

/s/ By: Stephen P. Ehrlich
Chief Deputh (sic) Clerk

ENTERED
ON THE DOCKET

JULY 5 1984

BY JAMES P. MANSPEAKER
CLERK

By .....

I certify that I mailed a copy of the attached Order and Judgment to the following:

Dated: July 5, 1984

JAMES R. MANSPEAKER, CLERK

/s/ By N. Hatcher
Deputy Clerk

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No. 84-1949
Grant v. Meyer

HOLLOWAY, Circuit Judge, dissenting:

I respectfully dissent.

I am impelled by recent and emphatic decisions of the Supreme Court to disagree with the majority opinion and the conclusions of the district court. To me, the clear meaning of the First Amendment decisions is that the imper-

atives of the Amendment on freedom of political communication, carried on in the modern day to an important extent by expenditures for publicity or contacts with the public, make any restriction on such communication highly suspect and subject to exacting scrutiny. In addition, the Supreme Court has recognized the special importance of protecting First Amendment rights with respect to *ballot measures*, like the Colorado initiative measure involved here. When examined with exacting scrutiny as the Court's decisions demand, the Colorado ban on compensation of solicitors for initiative measures fails, since all of the interests which the State suggests in defense of this restriction on communication are or can be protected by less instrusive measures.

I

On its own motion, this court requested that the parties address the question whether there should be abstention by the federal courts in this case, or a refusal to afford injunctive relief, because of the criminal sanctions in the Colorado statute banning the payment of initiative petition solicitors. In opposing an injunction pending appeal, the State's memorandum cited *Younger v. Harris*, 401 U.S. 37 (1971), *inter alia*, arguing that grounds for injunctive relief against enforcement of the State criminal statute were not demonstrated. The plaintiffs now are not pressing for injunctive relief, and have stated at argument that they are confident a declaratory judgment would be respected by the defendants. I am convinced that there is no impediment here to affording declaratory relief to protect these plaintiffs' rights under the First and Fourteenth Amendments.

There is no showing here of any pending proceeding in the State courts involving the merits of plaintiffs' constitu-

tional claim.[1] As noted, the plaintiffs now are seeking only declaratory relief to adjudge the Colorado statute invalid under the First and Fourteenth Amendments and the issue is ripe for determination.[2]

I am convinced that declaratory relief is appropriate in these circumstances. Plaintiffs Grant and Hoskins are individuals who are designated representatives of the petition to initiate the proposed constitutional amendment and plaintiff Coloradans For Free Enterprise, Inc. is a corporation supporting the amendment. Additional plaintiffs are registered voters of Colorado and all the plaintiffs allege that they desire to pay persons for their time and labor in circulating the petitions. I R. 2; *see also* II R. 13, 36. The plaintiffs are therefore parties "against whom these criminal statutes directly operate . . . ." *Doe v. Bolton*, 410 U.S. 179, 188 (1973). "Moreover, the State has not disavowed any intention of invoking the criminal penalty provision . . ." against these plaintiffs, *Babbitt v. United Farm Workers National Union*, 442 U.S. 289, 302 (1979),

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[1] We are advised by plaintiffs that "[s]ince the District Court decision, the Colorado Secretary of State has served notice of a hearing to determine whether there has been a violation by one of the Plaintiffs of the statute in question." Brief of Appellants 10. This is not, however, a pending state court proceeding in which the plaintiffs' constitutional claims are involved.

[2] Plaintiffs also request that this court extend the time period within which they must file their petition or, alternatively, that it order the Secretary of State to place this initiative measure on the November ballot. Brief of Appellants 11-12. This relief, however, was not sought before the district court and should not be considered for the first time on appeal. In addition to their prayer for injunctive and declaratory relief, costs and attorney's fees, there was a general prayer for relief, but we do not deem this sufficient to present a claim for the special relief of extending the time for circulation of the petitions or ordering the measure placed on the ballott (sic).

and the State here is vigorously upholding the statute in direct litigation with these plaintiffs. "[W]hen fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative, a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" *Id.* (quoting *Steffel v. Thompson*, 415 U.S. 452, 459 (1974)).

I feel, therefore, that these plaintiffs have standing to seek declaratory relief to vindicate their constitutional claim under the First and Fourteenth Amendments and that the federal court should not abstain in these circumstances from entering a proper declaratory judgment on the constitutional claim. Indeed, in *Steffel v. Thompson*, 415 U.S. at 469, in determining that declaratory relief was proper in light of the principles in *Younger v. Harris*, and *Samuels v. Mackell*, 401 U.S. 66 (1971), the Court pointed out that in *Doe v. Bolton* the Court had "affirmed the issuance of declaratory judgments of unconstitutionality, anticipating that these [criminal abortion statutes] would be given effect by the state authorities." In *Doe v. Bolton*, 410 U.S. at 188, the Court held that physicians had standing to challenge the abortion statute "despite the fact that the record does not disclose that any one of them has been prosecuted, or threatened with prosecution, for violation of the State's abortion statutes."

Thus, the plaintiffs have standing to assert their constitutional claim, and this is a proper case in which a declaratory judgment should be granted.

II

My basic disagreement on the merits is that the Colorado statute infringes essential rights of political com-

munication protected by the First and Fourteenth Amendments as those rights are recognized in recent decisions of the Supreme Court. The statute applies restrictions that are impermissibly broad in seeking to promote the State's asserted interests.

The critical facts are not in dispute. The individual plaintiffs are registered voters in Colorado and two of them are designated representatives of a petition to initiate a proposed amendment to the Constitution of Colorado. Plaintiff Coloradans for Free Enterprise, Inc. is a corporation organized under state law which supports the proposed constitutional amendment. The proposed amendment provides basically for the removal of motor carriers from the jurisdiction of the State Public Utilities Commission.

In order for the initiative measure to be placed on the November 1984 ballot, the proponents must obtain signatures of 46,737 registered voters on petitions supporting the measure before August 6, 1984. Plaintiffs wish to pay persons for circulating the petitions, but are prohibited from doing so by Colo. Rev. Stat. § 1-40-110 (1980),[4] which

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[4] Colo. Rev. Stat. § 1-40-110, as enacted, provides:

> Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of any initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. 1973.

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makes the payment to circulators of petitions a criminal offense.[5] Plaintiffs brought suit, claiming that the statute violates their rights to free speech and political association by limiting the pool of available petition circulators to those willing and financially able to contribute their time on a volunteer basis; this reduction in the available pool, they argued, serves to reduce significantly the ability of the initiative sponsors to communicate with the Colorado electorate, and thus substantially impedes the free flow of political ideas.

The district court rejected plaintiffs' claim, finding that the statute does not impose a burden on their right to free speech. The court stated that plaintiffs are not restricted in the personal communication of their belief in the proposition; that their ability to spend money on every other form of thought dissemination is totally unfettered; and that the statute only restricts generalized support for political thought, much as the contribution of money was regarded in *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam). The court also "[took] seriously" the State's interests sought to be achieved by the statute—(1) protect-

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This statute has been challenged at least once since its enactment. In *Urevich v. Woodard*, 667 P.2d 760 (Colo. 1983), the Supreme Court of Colorado held that "the language of section 1-40-110 is too broad to survive strict scrutiny" with respect to the right of initiative under the Colorado Constitution and accordingly deleted the word "inducement" from the statute. *Id.* at 763-64. The court did not express any view on the propriety of the regulation of "consideration." *Id.* at 763.

[5] Violation of the statute is a class 5 felony, which is punishable by one to two years' imprisonment plus one year of parole as the "presumptive" range of penalties. Colo. Rev. Stat. § 18-1-105 (Cum. Supp. 1983).

ing the integrity of the initiative process, and (2) insuring a broad base of support for any initiated measure.

In discussing the first asserted state interest, the court found that the testimony lends credence to the State's contentions that paid circulators would be persuaded to use sales techniques, not inherently illegal, just to enhance their own compensation. The court also referred to testimony of an incident in Florida where circulators padded petitions with names taken from a telephone book, and cited evidence showing that no effort is made in Colorado to verify the validity of signatures except on the filing of written objections.

With respect to the second asserted state interest, the court pointed to evidence of the history and limitations of the initiative process as lending ample credence to the State's contention that there is a significant need to insure any measure has a substantial base of support before it is submitted to the electorate. Specifically, the court pointed out that the initiative process started in the West as a "grassroots" means of protecting citizens from overpowering special interest groups, and that this process is relatively rigid in practice, in that once the measure is submitted to State officers for review and presented to the public, it cannot be changed in any way.

On this basis, the trial court concluded that plaintiffs failed to demonstrate their entitlement to relief and entered judgment in favor of defendants.

III

I cannot agree that the evidence is sufficient to support the district court's finding that the Colorado statute does

not impose a burden on plaintiffs' right to free speech.[6] The record evidence shows without dispute that a petition circulator, in obtaining signatures to a petition, engages in the communication of political ideas. The circulator approaches a stranger, asks him if he is a registered voter, and, if the person is willing to listen, advances arguments why the petition should be placed on the ballot.[7] *See* II R.

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[6] The district court also improperly considered the availability of other channels of communication in its analysis. This factor only becomes relevant in measuring the reasonableness of time, place, and manner regulations. *See, e.g., Clark v. Community for Creative Non-Violence,* 52 U.S.L.W. 4986, 4987 (U.S. June 29, 1984). The statute's ban on the payment of circulators, however, which so directly and substantially restricts plaintiffs' right to political speech, cannot be fairly characterized in those terms. "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place." *Schneider v. State,* 308 U.S. 147, 163 (1939).

[7] Paul Grant, one of the plaintiffs, gave the following testimony based on his experience as a petition circulator:

> [T]he way that we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, "Are you a registered voter?"
>
> Many people say, "I haven't got time, don't bother me," or "Yes, I am, but it is none of your business," or "Yes, I am, so what?"
>
> If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, "Please let me know a little bit more." Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from PUC regulations.
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10-12, 43. This process of soliciting signatures is therefore closely intertwined with a discussion of the merits of the measure. *See Libertarian Party of Oregon v. Paulus,* Civ. No. 82-521FR, slip op. at 4 (D. Ore. Sept. 3, 1982); *Hardie v. Fong Eu,* 18 Cal. 3d 371, 556 P.2d 301, 303, 134 Cal. Rptr. 201 (1976), *cert. denied,* 430 U.S. 969 (1977); *cf. Secretary of State of Maryland v. Joseph H. Munson Co.,* 52 U.S.L.W. 4875, 4878-79 (U.S. June 26, 1984) (in *Village of Schaumburg v. Citizens For Better a Environment,* 444 U.S. 620 (1980) (sic), Court determined that charitable solicitations are so intertwined with speech that they are entitled to protection of First Amendment).

The record also establishes that the available pool of petitioners will be less if they cannot be compensated for

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> Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign . . . .
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> . . . .
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> [We] [t]ried to explain the not just deregulation in this industry, that it would free up the industry from being cartelized, allowing freedom from moral choices, price competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.
>
> We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them.

II R. 10-11

their work. The district court itself acknowledged that "the evidence indicates plaintiffs' purposes would be enhanced if the corps of volunteers could be augmented by a cadre of paid workers." I R. 38; *see also Urevich v. Woodward*, 667 P.2d 760, 763 (Colo. 1983) ("We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay."). The simple fact is that people must earn a living and only a limited number of individuals can afford to devote the substantial amounts of time that may be necessary to collect signatures on a purely volunteer basis.[8] Beyond that, there are limitations as a practical matter on the sponsors' ability to motivate volunteers because of the rejection that petitioning necessarily brings.[9]

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[8] Paul Grant testified:

> Money is very definitely a motivating factor to get someone to work on behalf of an effort, a matter of raising the demand and you get more supply. You pay people. You pay them more. You get more people able and willing to do it. Many of the people that I work with in the Coloradans for Free Enterprise, most of them—well, the majority of the people I work with in the Libertarian Party are people who have jobs, and they either have jobs or don't have jobs. If they do have jobs, they can't afford to take time off to work on the drive. If they don't have jobs, and they are looking for them, they can't afford to be volunteers. So money either enables people to forego leaving a job, or enables them to have a job.

II R. 19-20.

[9] Lori Massie, director of recruitment for the ballot drive, testified:

> A petition circulator can very easily be motivated by money. If he knows he can collect money for his efforts, he is far more likely to spend six hours a day

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Thus, the effect of the statute's absolute ban on compensation of solicitors is clear. It impedes the sponsors' opportunity to convey their views to the public. It curtails the discussion of issues that normally accompanies the circulation of initiative petitions. And it shrinks the size of the audience that can be reached. *See Libertarian Party of Oregon v. Paulus*, slip op. at 4. In short, like the campaign expenditure limitations struck down in *Buckley*, the Colorado statute imposes a direct quantity restriction on political speech—a restriction which "necessarily reduces the quantity of expression . . . ." *Buckley*, 424 U.S. at 19.

In light of these restrictions on communication, it is incumbent on the State to show that the governmental interests advanced in its support satisfy the "exacting scrutiny" applicable to limitations on core First Amendment rights of political expression. *See Buckley*, 424 U.S. at 44-45, 47-48. I cannot agree that any such showing has been made here.

First, I cannot accept the district court's initial rationale for upholding the ban on payment of petition circulators —*i.e.*, protection of the integrity of the initiative process. Although the State has every right to take strong measures to prevent overreaching, improper offers of consideration

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> at it, than he would otherwise. The way it is right now, it is kind of a painful process to go out there and stand and ask people to sign something, and after an hour of being beaten over the head with "no's" or "drop dead" or whatever, if they were being paid and they knew that their success would relate to their pay, they would work on it. They would probably polish up their techniques also.

II R. 34.

for signatures, fraudulent signatures and other fraudulent or dishonest activities by petition circulators, the State may do so only by measures tailored to attack those problems, within clearly recognized areas permitted by the Supreme Court. This is borne out fully by the teachings of the Court's recent opinions. Solicitation of signatures for the ballot measure ". . . is not so inherently conducive to fraud and overreaching as to justify its prohibition." *Village of Schaumberg v. Citizens For a Better Environment,* 444 U.S. 620, 637-38 n.11 (1980). The broad intrusion banning the use of paid circulators entirely is not tailored to the least intrusive remedy, as the Court's opinions demand. This statute, which so broadly bans communication by paid solicitors, cannot stand under the Supreme Court's recent First Amendment decisions. Moreover, those decisions afford special protection to free and open communication in support of *ballot measures.* The Court has pointed out that improper influences resulting from contributions and expenditures for *candidates* are a danger of a greater magnitude than those made in support of particular issues or ballot measures.

The district court likened the Colorado statute to a restriction on contributions, one not unconstitutionally onerous under *Buckley.* I R. 40. I cannot agree with this classification because it is the plaintiffs' expenditures to pay circulators of plaintiffs' own specific ballot measure, which are banned. Thus, the plaintiffs' payments to the circulators are not an expression resting "solely on the undifferentiated, symbolic act of contributing." *Buckley,* 424 U.S. at 21. However, even if we assume that the statute could correctly be classified as a ban on contributions, it cannot stand. The Court's recent focus on the protection of

efforts in support of ballot measures—whether by contributions or expenditures—makes this plain.

In *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California,* 454 U.S. 290 (1981), the Court invalidated a city ordinance that limited contributions to committees formed to support or oppose ballot measures. Distinguishing its holding in *Buckley* which sustained limitations on political contributions to a candidate, the Court stated that:

> *Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* . . . .
>
> . . . *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures.*

Berkeley, 454 U.S. at 296-97 (emphasis in original).

In discussing the ordinance's impermissible restraint on the freedom of expression, the Court noted that by limiting contributions the ordinance "automatically affects expenditures" and that "limits on expenditures operate as a direct restraint on freedom of expression" of groups engaging in ballot measure campaigns. *Id.* at 299. Distinguising candidate and ballot measure campaigns, the Court emphatically concluded that "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Id.* The Court reasoned that the integrity of the political system would be adequately protected by alterrative means such as public disclosure or the outlawing of anonymous contributions. *Id.* at 299-300.

The distinction between the State's interest in regulating the campaigns of candidates and regulating campaigns for ballot measures was also discussed in *First National Bank of Boston v. Bellotti,* 435 U.S. 765 (1976). There the Court struck down a state criminal statute prohibiting corporations from making contributions or expenditures "for the purpose of . . . influencing or affecting the vote on any question submitted to the voters, other than one materially affecting any of the property, business or assets of the corporation." As noted by the Ninth Circuit in *C & C Plywood Corp. v. Hanson,* 583 F.2d 421, 424-25 (9th Cir. 1978), *Bellotti* made no distinction between contributions and expenditures in deciding that the statute was unconstitutional, but did, however, draw a clear distinction between ballot issues and partisan elections. The Court observed that:

> Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . simply is not present in a popular vote on a public issue. To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly a reason to suppress it: The Constitution "protects expression which is eloquent no less than that which is unconvincing." . . . We noted only recently that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment . . . ."

Bellotti, 435 U.S. at 790-91 (footnotes and citations omitted); *see also Let's Help Florida v. McCrary,* 621 F.2d at 197, 199-201 (invalidating Florida statute that restricted size of contributions to any political committee in support

of, or opposition to, ballot issues); *C & C Plywood Corp. v. Hanson,* 583 F.2d at 424-25 (invalidating Montana law that prohibited corporations from making contributions in support of, or opposition to, ballot issues); *Schwartz v. Romnes,* 495 F.2d 844, 852-53 (2d Cir. 1974) (New York statute that prohibited corporate contributions for political purposes must be construed narrowly under First Amendment so that corporations may contribute to referendum campaign).

Although the State strenuously argues that it is not asserting a concern about fraud, it seems clear that the State has been compelled to attempt to avoid the Supreme Court's rejection in *Buckley* of the rationale of preventing fraud. In *Buckley* the Court held that the prevention of corruption did not constitute an interest sufficiently substantial to warrant the direct infringement of political communication represented by campaign expenditure limitations; that concern could be addressed by other measures. 424 U.S. at 45, 55-56; *cf. Secretary of State of Maryland v. Joseph H. Munson Co.,* 52 U.S.L.W. at 4881 n.16 (concerns about unscrupulous professional fundraisers or about fraudulent charities not a sufficient state interest to justify prohibiting charitable organizations, in connection with fundraising activities, from paying expenses of more than 25% of amount raised; such concerns could be accommodated directly through disclosures and registration requirements and penalties for fraudulent conduct).

The state fails to make any substantial argument that the Colorado General Assembly cannot effectively protect the integrity of the initiative process by laws more narrowly tailored to specific abuses. Colorado has existing statutes that make it unlawful to forge a signature on a pe-

tition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. *See* Colo. Rev. Stat. §§ 1-13-106, 1-40-119, 1-40-110 (1980). The statutes also require that conspicuous warnings of criminal offenses be printed on every petition (see Appendix hereto), and that circulators attach an affidavit attesting *inter alia* to the validity of the petitioner's signatures. *See id.* § 1-40-106 (Cum. Supp. 1983); *see also* Colo. Const. art. V, § 1. Finally, the Colorado statutes provide for elaborate protest procedures for challenging the sufficiency of any petition, permitting both an administrative determination and an opportunity for judicial review.[10] *See* Colo. Rev. Stat. § 1-40-109 (Cum. Supp. 1983).

The State suggests that paid petition circulators may be too persuasive, or use irrelevant arguments, in convincing persons to sign the petitions. It suffices to say that the relative merits of the method of presentation and of the ballot measure itself are for the public to weigh and consider. The First Amendment is a value-free provision whose protection is not dependent on "the truth, popularity, or social utility of the ideas and beliefs which are offered." *NAACP v. Button*, 371 U.S. 415, 445 (1963). "The very purpose of the First Amendment is to foreclose

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[10] For examples of judicial review of ballot measures in Colorado and other jurisdictions, see *Billings v. Buchanan*, 192 Colo. 32, 555 P.2d 176, 176-79 (1976); *Case v. Morrison*, 118 Colo. 517, 197 P.2d 621, 621-24 (1948); *Haraway v. Armstrong*, 95 Colo. 398, 36 P.2d 456, 457-58 (1934); *Miller v. Armstrong*, 84 Colo. 416, 270 P. 877, 878-79 (1928); *Oklahomans for Modern Alcoholic Beverage Controls v. Shelton*, 501 P.2d 1089, 1091-95 (Okla. 1972); *In re Referendum Petition No. 18 State Question No. 437*, 417 P.2d 295, 296-98 (Okla. 1966); *Community Gas & Service Co. v. Walbaum*, 404 P.2d 1014, 1015-17 (Okla. 1965).

public authority from assuming a guardianship of the public mind . . . . In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring).

Second, I also cannot accept the State's defense of the statute based on its assertion of a "compelling" interest in requiring that an initiative have a wide base of public support before an initiative is placed on the ballot. This argument ignores the requirement in Colo. Rev. Stat. § 1-40-105 (Cum. Supp. 1983) that a petition be signed by registered electors in an amount equal to at least five percent of the total number of votes cast for all candidates for the office of Secretary of State at the previous general election. Such requirement for petition signatures, which in this case calls for a minimum of 46,737 signatures of registered voters, protects the State's interest in requiring a broad base of popular support. Further, as noted above, the validity of the required number of signatures can be reviewed in administrative and judicial proceedings questioning the signatures.

IV

I am particularly persuaded by the anlysis of other courts which have struck down similar restrictions on the payment of petition circulators as invalid under the First and Fourteenth Amendments.

It is true that in *State v. Conifer Enterprises, Inc.*, 82 Wash. 2d 94, 508 P.2d 149 (1973), the Washington Supreme Court held that a Washington statute prohibiting payment of petition circulators did not violate the First Amend-

ment. However, that case was decided before *Buckley* and was based on the Washington court's finding that while the solicitation of signatures on an initiative petition is political expression protected by the First Amendment, there is no necessary relationship between the payment of circulators and the exercise of that right. 508 P.2d at 153. *Buckley* rejected this theory, stating that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached. This is because virtually every means of communicating ideas in today's mass society requires the expenditure of money." 424 U.S. at 19 (footnote omitted).

In *Libertarian Party of Oregon v. Paulus*, Civ. No. 82-521FR (D. Ore. Sept. 3, 1982), the federal district court invalidated an Oregon statute prohibiting payment to petition circulators as violating the plaintiffs' First Amendment rights, relying primarily on *Buckley*. The court held that the statute restricted political speech because obtaining signatures on a nominating petition required the circulator to explain the candidate's views on political issues. The court pointed out that fewer people would undertake the task of circulating petitions if they could not be paid, and that the restraint was not necessary to advance a compelling state interest in preventing fraud, intimidation, or corruption. The court stated that the statute was really an indirect means of dealing with such problems and that the Legislature could deal with corruption in the circulation process by laws more narrowly aimed at specific abuses, as it had by imposing criminal penalties for forging

signatures and for misrepresentation during the circulation process. *Id.* at 4-5.

In *Hardie v. Fong Eu*, 18 Cal. 3d 371, 556 P.2d 301, 134 Cal. Rptr. 201 (1976), *cert. denied*, 430 U.S. 969 (1977), the California Supreme Court similarly held that a statute limiting the amount that could be spent on the circulation of petitions was unconstitutional. The court relied on *Buckley* and particularly its recognition that virtually every means of political communication in modern society requires or involves the expenditure of money. 556 P.2d at 303. The court stated that "the process of solicitation of [petition] signatures, of necessity, involves the discussion of the merits of the measure. The circulators themselves thus become unavoidably a principal means of advocacy of the proposal." *Id.* The court concluded that there remained a demonstrable potential for serious infringement on the right to political communication guaranteed by the First Amendment. Further, the limitations imposed by the statute were not justified by a "compelling" state interest in preventing corruption or in assuring that positions on the ballot could not be bought; corruption could be dealt with effectively by laws more narrowly aimed at specific abuses. *Id.* at 304.

Thus, in the only two post-*Buckley* cases dealing with the restrictions similar to one before us, the courts have struck down the restrictions as violative of the First and Fourteenth Amendments.

V

In sum, I conclude that Colo. Rev. Stat. § 1-40-110 invalidly imposes a direct and substantial restriction on plaintiffs' right to political speech, employing unneces-

sarily broad prohibitions. In the area of free expression, "[p]recision of regulation must be the touchstone . . . ." *NAACP v. Button,* 371 U.S. at 438. Therefore, I would hold that the Colorado statute violates the First and Fourteenth Amendments, and would grant declaratory relief to these plaintiffs.

APPENDIX

"WARNING
IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR

TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

PETITION TO INITIATE

TO: The Honorable Natalie Meyer, Secretary of the State of Colorado.

We, the undersigned, registered electors of the State of Colorado respectfully order and demand that: The following proposed Amendment to the Constitution of the State of Colorado shall be submitted to the voters for their adoption or rejection at the polls at the next general election to be held on Tuesday, November 6, 1984, and each of the signers also states:

I sign this petition in my own proper person only, and I am a registered elector of the State of Colorado: My residence address and the date of signing this petition are correctly written after my name and I designate the following persons to represent me in all matters affecting this petition.

Paul Grant, 6541 Kilimanjaro, Evergreen, Colorado 80439

Brian Erickson, 2685 South Dayton Way, #262, Denver, Colorado 80231

Edward Hoskins, 150 South Clarkson Street, #308, Denver, Colorado 80209

The *title* to the proposed initiative to the Constitution petitioned for herein, as designated by the Secretary of State, Attorney General, and Director of the Legislative Drafting Office, (hereafter to be referred to as the Board) is as follows, to wit:

AN AMENDMENT TO ARTICLE XXV OF THE COLORADO CONSTITUTION PROHIBITING REGULATION, AS PUBLIC UTILITIES, OF PERSONS AND BUSINESSES WHICH TRANSPORT PEOPLE OR PROPERTY FOR COMPENSATION.

"WARNING
IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR

TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

The proposed initiated AMENDMENT TO THE CONSTITUTION OF THE STATE OF COLORADO is as follows:

Be It Enacted by the People of the State of Colorado: Article XXV of the Constitution of the State of Colorado is amended by the addition of a sentence to the end of the first paragraph to read:

"Effective January 1, 1985, no person, corporation, or other legally recognized business entity engaged in the transportation of persons or property for compensation, shall be defined as public utilities, nor shall they be regulated as such."

The *summary* to the proposed initiative as designated by the Board is as follows:

Effective January 1, 1985, no one engaged in transporting persons or property for compensation would be defined or regulated as a public utility.

In the 1985-86 fiscal year, it is estimated that the measure would reduce state expenditures by approximately $2,000,000.00 and would reduce state revenues by approximately $1,500,000.00.

The *ballot title and submission clause* as designated and fixed by the Board is:

SHALL THERE BE AN AMENDMENT TO ARTICLE XXV OF THE COLORADO CONSTITUTION TO PROHIBIT REGULATION, AS PUBLIC UTILITIES, OF PERSONS AND BUSINESSES WHICH TRANSPORT PEOPLE OR PROPERTY FOR COMPENSATION?

YES ☐ NO ☐

"WARNING
IT IS AGAINST THE LAW:

For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector.

DO NOT SIGN THIS PETITION UNLESS YOU ARE A REGISTERED ELECTOR

TO BE A REGISTERED ELECTOR, YOU MUST BE A CITIZEN OF COLORADO AND REGISTERED TO VOTE.

Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning."

Printed Name of Elector	Signature of Elector	Street and Number	City or Town County	Date Signed
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	
		——	——	

AFFIDAVIT OF CIRCULATOR
STATE OF COLORADO
COUNTY OF ——————

I, being first duly sworn, depose and say; I am a registered elector of the State of Colorado and my address is .....

I have circulated the foregoing petition and each signature thereon was affixed in my presence; and each signature thereon is the signature of the person whose name it purports to be, and to the best of my knowledge and belief each of the persons signing said petition was at the time of such signing a qualified elector of the State of Colorado; I have neither received nor have I entered into any contract whereby I will in the future receive any money or other thing of value in consideration of or as an inducement to the circulation of the above petition by me; I have not nor will I pay in the future and I believe that no other person has so paid or will pay, directly or indirectly, any money or other thing of value to any signer for the purpose of in-

ducing or causing such signer to affix his signature to such petition.

.....

(Signature of Circulator)

Subscribed and sworn to before me in the county of ....., state of Colorado, this ..... day of ....., 19.....

My commission expires .....

.....

Notary Public Address

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JULY TERM—September 2, 1987

Before Honorable William J. Holloway, Jr., Chief Judge, Honorable James E. Barrett, Honoable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, and Honorable Bobby R. Baldock, Circuit Judges.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, and COLORADANS FOR FREE ENTERPRISES, INC., Plaintiffs-Appellants, v. NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General, Defendants-Appellees.	JUDGMENT No. 84-1949 (D.C. # 84-JM-1207)

This cause came on to be heard on the record on appeal from the United States District Court for the District of Colorado, and was argued by counsel.

Upon consideration whereof, it is ordered that the judgment of that court is reversed. The cause is remanded

to the United States District Court for the District of Colorado for further proceedings in accordance with the opinion of this court.

/s/ ROBERT L. HOECKER, Clerk

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL K. GRANT, et al., Plaintiffs,	)	NO. 84-1949
	)	D.C. # 84-JM-1207
	)	RECEIPT FOR
v.	)	MANDATE
	)	
NATALIE MEYER, etc., et al., Defendants.	)	(Filed September 28, 1987)

Received from Robert L. Hoecker, Clerk, and filed upon receipt, the mandate of the United States Court of Appeals in the above case, directed to Mr. James R. Manspeaker, Clerk, U.S.D.C. for the D. of Colorado.

DATED: 9/28/87 /s/ Gail Callaghan, Deputy

Please Date, Sign and Return to:

Clerk's Office
U.S. Court of Appeals, 10th Circuit
C-404 United States Courthouse
Denver, Colorado 80294

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, and COLORADOANS FOR FREE ENTERPRISE, INC. a Colorado corporation,	)	
Plaintiffs-Appellants,	)	No. 84-1949
v.	)	
NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, Colorado Attorney General,	)	
Defendants-Appellees.	)	

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 6, 1987)

NOTICE IS HEREBY GIVEN that Natalie Meyer and Duane Woodard, the Defendants-Appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Tenth Circuit entered in this action on September 2, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

FOR THE ATTORNEY GENERAL

/s/ MAURICE KNAIZER, #05264
First Assistant Attorney General
General Legal Services Section

Attorneys for Defendants-Appellees

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: 866-5385

CERTIFICATE OF SERVICE

This is to certify that I have served the foregoing NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon all parties herein by placing a correct copy of same in the United States mail, postage prepaid, at Denver, Colorado, this 5th day of October, 1987, addressed as follows:

William C. Danks, Esq.
620 Steele Park Bldg.
50 S. Steele Street
Denver, Colorado 80209

/s/ Ann M. Aragon

Subscribed and sworn to before me this 5th day of October, 1987. My Commission expires: June 4, 1991

/s/ Prestine Mickens
Notary Public

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, and COLORADOANS FOR FREE ENTERPRISE, INC. a Colorado corporation,

Plaintiffs-Appellants,

v.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, Colorado Attorney General,

Defendants-Appellees.

AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 23, 1987)

NOTICE IS HEREBY GIVEN that Natalie Meyer and Duane Woodard, the Defendants-Appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Tenth Circuit entered in this action on September 2, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

FOR THE ATTORNEY GENERAL

/s/ TIMOTHY ARNOLD, #03417
MAURICE KNAIZER, #05264
First Assistant Attorney General
General Legal Services Section

Attorneys for Defendants-Appellees

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: 866-5385
AG Alpha No: ST EL HBEPQ

AFFIDAVIT OF SERVICE

This is to certify that I have served the foregoing AMENDED NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES upon all parties herein by placing a correct copy of same in the United States mail, postage prepaid, at Denver, Colorado, this 23rd day of October, 1987, addressed as follows:

William C. Danks, Esq.
3033 E. 1st Ave., #303
Denver, Colorado 80206

/s/ Maurice Knaizer

Subscribed and sworn to before me this 23rd day of October, 1987. My Commission expires: June 4, 1991

/s/ Prestine Mickins
NOTARY PUBLIC
13602 E. Dakota Pl.
Aurora, CO 80012

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84 F 1207

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH A. HARRISON, COLORADOANS FOR FREE ENTERPRISE, INC. a Colorado corporation,

Plaintiffs-Appellants

v.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, Colorado Attorney General,

Defendants-Appellees.

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

(Filed October 23, 1987)

NOTICE IS HEREBY GIVEN that Natalie Meyer and Duane Woodard, the Defendants-Appellees, hereby appeal to the Supreme Court of the United States from the final judgment of the United States Court of Appeals for the Tenth Circuit entered in this action on September 2, 1987.

This appeal is taken pursuant to 28 U.S.C. § 1254(2).

FOR THE ATTORNEY GENERAL

/s/ TIMOTHY ARNOLD, #03417
MAURICE KNAIZER, #05264
First Assistant Attorney General
General Legal Services Section

Attorneys for Defendants-Appellees

1525 Sherman Street, 3rd Floor
Denver, Colorado 80203
Telephone: 866-5385
AG Alpha No.: ST EL HBEPQ

AFFIDAVIT OF SERVICE

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William C. Danks, Esq.
3033 E. 1st Ave., #303
Denver, Colorado 80206

/s/ Maurice Knaizer

Subscribed and sworn to before me this 23rd day of October, 1987. My Commission expires: June 4, 1991.

/s/ Prestine Mickins
NOTARY PUBLIC
13602 E. Dakota Pl.
Aurora, CO 80012

No. 87-920

In The
Supreme Court of the United States
October Term, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and

DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

vs.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MOTION TO AFFIRM

WILLIAM C. DANKS
Attorney for Appellees.
3033 East First Ave., #303
Denver, Colorado 80206
Telephone: (303) 377-5542

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

QUESTION PRESENTED

Does that portion of Colo. Rev. Stat. Sec. 1-40-110, which prohibits payment to circulators of petitions violate the Plaintiffs' rights to freedom of speech and political association guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States?

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TABLE OF AUTHORITIES

No. 87-920

—o—

In The
Supreme Court of the United States
October Term, 1987

—o—

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and

DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

vs.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

—o—

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

MOTION TO AFFIRM

—o—

The appellees move to affirm the judgment of the United States Court of Appeals for the Tenth Circuit on the ground that the appeal is so unsubstantial as not to need further argument. Rule 16.1(c).

STATEMENT

1. The appellees are five individuals and one corporation.[1] They sought to spend their own money to hire other people to circulate initiative petitions. They were prevented from doing this by a Colorado criminal statute.

2. Colo. Rev. Stat. sec. 1-40-110 made it a felony offense for the appellees to spend their money to hire others to circulate initiative petitions.

3. The Tenth Circuit held that Colo. Rev. Stat. sec. 1-40-110 was unconstitutional because it violated the appellees' right to freedom of speech under the First and Fourteenth Amendments to the United States Constitution.

4. The petitions involved in this case were being circulated under the initiative provision of the Colorado State Constitution. In order for an initiative to be placed on the ballot, signatures of registered voters constituting 5% of those who voted for the office of Secretary of State in the last general election, (in this case 46,737 signatures), had to be obtained. Colo. Const. Art. V, Sec. 1. The petition called for a ballot initiative to amend the Constitution of the State of Colorado to remove motor carriers from the jurisdiction of the State Public Utilities Commission.

5. According to Appellant's trial Exhibit E, twenty-four states have some form of initiative process. Of these,

---

1. The corporation does not have any affiliates, subsidiaries or a parent corporation.

only Colorado, Nebraska and Washington prohibit paid circulators. The remainder of the states, (21) allow paid petition circulators.

---o---

ARGUMENT

The Opinion on Rehearing En Banc of the United States Court of Appeals for the Tenth Circuit succinctly states the issue and the reasons why this statute is unconstitutional. Without restating that opinion, this Court should affirm for the following reasons:

1. Colo. Rev. Statute sec. 1-40-110 does not prevent the appellees from spending their money to generally advertise to registered voters the message to sign the petition. However, it does prevent them from hiring petition circulators to carry the message.

2. The most effective way to reach and convince someone to sign the petition is through the petition circulator.

3. The petition circulator approaches a stranger, asks him if he is a registered voter, and if the person is willing to listen, advances arguments why the initiative should be placed on the ballot. This constitutes freedom of speech regarding basic political issues.

4. The appellees testified that they had attempted to convey their message to sign the petition by individually being petition circulators. They testified that they had attempted to reach more people with their message by recruiting other volunteer petition cir-

culators. They further testified that the most cost-effective method for them to reach the greatest number of people would be through hiring petition circulators. It was impractical for them to spend their limited resources on newspaper, television or other general advertising. The prohibition against hiring petition circulators limited the number of people which each of the appellees could reach with their message. (Transcript pp. 13, 14, 32 and 36).

5. The State of Colorado has an interest in permitting only those measures which have a reasonable likelihood of passage from being placed on the ballot. The State argues that permitting only "volunteer" circulated petitions promotes this interest.

The State introduced comparison statistics gathered from other states where it is permissible to pay petition circulators. The statistics showed that a higher percentage of ballot measures were passed by the electorate when the petition signatures were gathered by "volunteer" petition circulators than where the petition signatures were gathered by paid petition circulators. However, certainly not all petitions which used paid circulators failed and not all "volunteer" measures passed. The correlation between paid vs. non-paid petition circulators and ultimate success with the electorate is far from definitive.

However, even if there is a correlation between the ultimate success of a measure and whether the signatures were gathered by paid vs. non-paid petition

circulators, there is a method to promote this governmental interest which does not infringe on the appellees freedom of speech. This interest is protected by requiring the signatures of the 46,767 registered voters before the measure is placed on the ballot. This requirement ensures that there is a reasonable likelihood of passage before the matter is placed on the ballot.

On p.6 of its Jurisdictional Statement, the State of Colorado argues that its "evidence established that paying circulators will transform a grassroots, volunteer effort into a commercialized venture, which undermines the ability of the State to determine whether there is sufficient public support to warrant the time and expense of placing the measure on the ballot."

This passage illustrates the ambiguity in the State's position. Does the State argue that it has some type of interest in preventing initiatives which are sponsored by business from being placed on the ballot? What is the additional "time and expense" to the State of Colorado from having one or more initiatives on the ballot? Is the State of Colorado more concerned with eliminating initiatives which are destined for defeat or with minimizing the number of initiatives which will be passed by the electorate? Regardless, the State of Colorado has articulated no State interest which justifies the abridgment of the appellees' right to freedom of speech on fundamental political issues.

6. The Tenth Circuit opinion is consistent with previous decisions of this Court. *Buckley v. Valleo*, 424 U.S. 1

(1976), *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978).

> "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate* . . .
>
> " . . . *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures.*" *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California*, 454 U.S. 290, 296-97 (1981). (Emphasis in original.)
>
> "We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances." *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 496-97 (1985).

7. The Tenth Circuit reached the same decision as the other federal courts which have ruled on the constitutionality of similar statutes. *Ficker v. Montgomery County Board of Elections*, No. R-85-4365 Slip Op. (D. Md. Dec. 23, 1985); *Libertarian Party of Oregon v. Paullus*, Civ. No. 82-521 F.R., Slip. Op. (D.Ore., Sept. 3, 1982); *D.C. Committee on Legalised Gambling v. Rauh*, No. 79-3296, Slip. op. (D.C. Dec. 21, 1979).

—o—

CONCLUSION

Wherefore, the Court should affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

WILLIAM C. DANKS
Attorney for Appellees.
3033 East First Ave., #303
Denver, Colorado 80206
Telephone: (303) 377-5542

(3)

No. 87-920

In The

Supreme Court of the United States

October Term, 1987

—o—

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

v.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

—o—

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

JOINT APPENDIX

—o—

DUANE WOODARD
Attorney General
CHARLES B. HOWE
Deputy Attorney General
RICHARD H. FORMAN
Solicitor General
BILLY SHUMAN
Counsel of Record
MAURICE G. KNAIZER
First Assistant Attorney General
Office of the Attorney General
1525 Sherman Street, 3rd Floor
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Telephone: (303) 866-5441
Counsel for Appellants

WILLIAM DANKS
3033 East First Avenue
Suite 303
Denver, Colorado 80206
Attorney for Appellees

APPEAL FILED NOVEMBER 23, 1987
PROBABLE JURISDICTION NOTED
JANUARY 19, 1988

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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RELEVANT DOCKET ENTRIES

PAUL K. GRANT, *et al.* vs. NATALIE MEYER, *et al.*

DATE 1984	NR.	PROCEEDINGS
6/12	X	COMPLAINT—pd.
	X	MOTION for Temporary Restraining Order and Preliminary Injunction . . . by pltf
		Plaintiffs' Brief in Support of Motions for Temporary Restraining Order and Preliminary Injunction
6/15		Petition to Intervene Embracing Statement of Claim or Defense by Donn McMorris
		HEARING on Motion for TRO and Prel Injunc . . . Petition to intervene DENIED . . . motion for prel injunc DENIED . . . trial on merits will be calendared as quickly as possible . . . eod 6/18/84
	X	ORDER (JPM) . . . plf motion for TRO and Prel Injunc DENIED . . . COM. . . eod 6/18/84
		MINUTE ORDER AND NOTICE OF TRIAL SETTING . . . (JPM) . . . 1 day trial to court set 8:30 6/27/84 . . . defs to answer at least 5 days prior to trial . . . COM . . . eod 6/18/84
6/20		MOTION for Leave to Amend Complaint . . . by Pltfs.
		MOTION to Participate as Amicus Curiae Pursuant to Rule 407 of LRCP . . . by Colorado Education Assoc. & Colo. Assoc. of Public Employees
6/21		MINUTE ORDER (JPM) . . . Pltfs. motion for leave to amend complaint (filed 6/20/84) is DENIED . . . com . . . eod 6/21/84

6/22 X ANSWER To Complaint & Amended Complaint . . . by Defts.

ORDER (JPM) . . . Ordered:Motion to Participate as Amicus Curiae Pursuant to Rule 407 of the Local Rules of Practice by Colo. Education Assoc. & Colo. Assoc. of Public Employees is DENIED . . . com . . . eod 6/25/84

6/25 Proposed Findings of Fact & Conclusions of Law . . . by Pltfs.

6/26 MOTION for Admission Pro Hac Vice of Paul H. Kunberger . . . by William C. Danks

Pltfs. List of Witnesses & Exhibits

Memorandum of Law . . . by Pltfs.

6/27 TRIAL TO COURT—1st Day (JPM) . . . ORDERED: Motion for admission pro hac vice (filed 6/26/84 is GRANTED & Paul H. Kumberger may participate in this case . . . Pltfs. Exh. 1 is received by stipulation . . . witnesses . . . Pursuant to motion of pltfs. Court takes judicial notice of Colorado Statutes CRS 1-40-110, CRS 1-13-106 & CRS 1-40-119 . . . ORDERED: Witness received as expert in initiative process . . . Pltfs. motion to strike testimony of this witness . . . Motion DENIED . . . Pursuant to request by defts. Court takes judicial notice of CRS 1-40-11 . . . Closing arguments . . . ORDERED: Case is taken under advisement . . . eod 6/27/84

Witness List . . . by Defts.

7/ 3 X ORDER (JPM) . . . Judgment enter in favor of defts. & against pltfs. Defts. shall be awarded costs upon filing of a proper bill of costs within 10 days of entry of judgment . . . com . . . eod 7/5/84

7/ 5 X JUDGMENT (SPE) . . . ORDERED: Judgment is entered in favor of defts. Natalie Meyer & Duane Woodard, & against pltfs., Paul K. Grant, Edward Hoskins, Nancy P. Bigbee, Lori A. Massie, Ralph R. Harrison & Coloradans for Free Enterprises, Inc. . . . defts. shall have their costs upon filing of a bill of costs within 10 days of entry of judgment . . . action is DISMISSED . . . com . . . eod 7/5/84

7/ 6 X NOTICE OF APPEAL, filed by Plaintiffs in re: Order of July 5, 1984 . . . com. by PHONE Transcript. Designation Conference set for Monday, July 16, 1984 at 9:00 a.m. Order due July 16, 1984. $65.00 fee paid and $5.00 fee paid.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.

———o———

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Plaintiffs,

vs.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Defendants.

———o———

COMPLAINT

———o———

The Plaintiffs, for their Complaint, allege:

1. The Court has jurisdiction of this case because of a federal question. 28 U.S.C. § 1331, 42 U.S.C. § 1983, U.S. Constitution, First and Fourteenth Amendments.

2. The individual Plaintiffs are each registered voters in the State of Colorado. In addition, Paul Grant and Edward Hoskins are the designated representatives of a Petition to initiate a proposed Amendment to the Constitution of the State of Colorado to be submitted to the voters for their adoption or rejection at the polls at the next general election to be held on Tuesday, November 6, 1984.

3. The Plaintiff, Coloradans For Free Enterprise, Inc (CFE), is a corporation organized under the laws of

the State of Colorado. CFE supports the proposed constitutional amendment.

4. The proposed initiated Amendment to the Constitution of the State of Colorado is as follows:

> "Be It Enacted by the People of the State of Colorado: Article XXV of the Constitution of the State of Colorado is amended by the addition of a sentence to the end of the first paragraph to read:
>
> " 'Effective January 1, 1985, no person, corporation, or other legally recognized business entity engaged in the transportation of persons or property for compensation, shall be defined as public utilities, nor shall they be regulated as such.' "

5. The Defendant, Natalie Meyer, is sued in her official capacity as Secretary of the State of Colorado and the Defendant, Duane Woodard, is sued in his official capacity as the Attorney General of the State of Colorado.

6. In order for this initiative to be placed on the ballot, a Petition must be signed by at least 46,737 valid signatories of registered voters before August 6, 1984. In obtaining the signatures, the circulator of the Petition explains and discusses the proposed amendment with the person being asked to sign the Petition.

7. In order to ensure that sufficient signatures are obtained on the Petition by August 6, 1984, the Plaintiffs desire to pay persons for their time and labor in circulating the Petitions. Furthermore, some or all of the Plaintiffs desire to be paid for their time and labor in circulating the Petitions. However, the laws of the State of Colorado, C.R.S., 1-40-110, make it a criminal offense for any person or corporation to pay to or receive money for circulating petitions.

8. The statute of the State of Colorado violates the First Amendment rights of the Plaintiffs to free speech and association. It is therefore unconstitutional and invalid.

9. The Plaintiffs will be irreparably damaged unless the Court immediately declares the statute unconstitutional in that the Plaintiffs are desirous of immediately having paid circulators. The Plaintiffs are in jeopardy of being arrested for violating the statute and every day in which they delay paying circulators jeopardizes the chances of obtaining the necessary signatures by August 6, 1984.

WHEREFORE, the Plaintiffs pray for an injunction enjoining the State of Colorado from enforcing C.R.S., 1-40-110, and for a declaration that C.R.S., 1-40-110 is unconstitutional, for attorney's fees pursuant to 42 U.S.C. § 1988, costs and other appropriate relief.

Respectfully submitted

/s/ WILLIAM C. DANKS, No. 4758
Attorney for Plaintiffs
620 Steele Park Building
50 South Steele Street
Denver, Colorado 80209
393-0433

VERIFICATION

STATE OF COLORADO)
) ss.
CITY AND COUNTY OF DENVER)

I, Paul K. Grant, one of the above-named plaintiffs, after being duly sworn, state that upon my personal knowl-

edge, the allegations of fact in this Complaint are true.

/s/ Paul K. Grant

Subscribed and sworn to before me this 12th day of June 1984.

WITNESS my hand and official seal.

/s/ Carol A. Norman
Notary Public

My Commission Expires March 2, 1986
50 So. Steele St., Suite 620
Denver, Colorado 80209

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

No. 84-JM-1207

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Plaintiffs,

vs.

NATALIE MEYER, in her official capacity as Colorado Secretary of State and
DUANE WOODARD, in his official capacity as Colorado Attorney General,

Defendants.

ANSWER TO COMPLAINT AND
AMENDED COMPLAINT

(Filed June 22, 1984)

COME NOW Defendants Secretary of State Natalie Meyer and Colorado Attorney General Duane Woodard, by and through the Office of the Attorney General, and hereby respond to the complaint as follows:

1. Defendants admit the allegations in paragraphs 2, 3, 4, 5 and 6 of the complaint.

2. Defendants deny all of the allegations in paragraphs 1, 8 and 9 of the complaint.

3. With respect to paragraph 7 of the complaint, defendants admit that C.R.S. 1-40-110 (1980) makes it a criminal offense to pay or receive money for circulating any initiative or referendum petition, but are without sufficient knowledge or information to form a belief as to the truth or accuracy of the remaining allegations, and therefore deny same.

4. With respect to the amendment to paragraph 7 of the complaint, defendants deny that the language of C.R.S. 1-40-106 (1980) violates the First and Fourteenth Amendments to the U.S. Constitution.

WHEREFORE, defendants pray that plaintiffs take nothing by their complaint, that the complaint be dismissed, that defendants be awarded their costs of this action, and such further relief as the court deems just and appropriate.

DATED this 22nd day of June, 1984.

FOR THE ATTORNEY GENERAL
Cheryl J. Hanson, #12014, for
Ruthanne Gartland

RUTHANNE GARTLAND, #2283
First Asst. Attorney General
General Legal Services Section
Attorneys for Defendants
1525 Sherman Street, 3d Floor
Denver, Colorado 80203
Telephone: 866-3611

CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing ANSWER TO COMPLAINT AND AMENDED COMPLAINT upon all parties herein by placing a true and correct copy of same in the United States mail, postage prepaid, at Denver, Colorado, on this 22d day of June, 1984, addressed as follows:

William C. Danks, Esq.
50 South Steele Street, Suite 620
Denver, Colorado 80209

/s/ Deborah Shuchter

(p. 1) IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 84-JM-1207

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Plaintiffs,

vs.

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODWARD, in his official capacity as Colorado Attorney General,

Defendants.

OFFICIAL TRANSCRIPT

Trial

Proceedings before the HONORABLE JOHN P. MOORE, Judge, United States District Court for the District of Colorado, beginning at 8:40 a.m. on the 27th day of June, 1984, in Courtroom C-502, United States Courthouse, Denver, Colorado.

APPEARANCES:

WILLIAM C. DANKS, Attorney at Law, Denver, Colorado, and PAUL H. KUMBERGER, Attorney at Law, Oregon, appearing for Plaintiffs.

(p. 2) APPEARANCES: (Continued)

RUTHANNE GARTLAND, First Assistant Attorney General, Denver, Colorado, appearing for Defendants.

* * *

(p. 5) Ms. Gartland: I do not, Your Honor, not at this time.

The Court: All right, you may call your first witness.

Mr. Danks: Mr. Paul Grant.

PAUL GRANT

called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

The Clerk: Please state your name and address for the record.

The Witness: My name is Paul Grant and my address is 6541 Kilimanjaro, in Evergreen, Colorado.

DIRECT EXAMINATION

By Mr. Danks:

Q Mr. Grant, you are one of the plaintiffs engaged in this lawsuit, is that correct?

A Yes, I am.

Q In brief format, give us your background. Where did you go to college? What is your educational background and what is your occupation?

A I have two degrees in chemical engineering, a Bachelor's and a Master's, the Master's from the University of Maryland. Three years experience in the United States Army. My profession is working as a sales engin-

eer. I sell process equipment to chemical and mine companies. I have been in sales for the last eight years.

I have also been active in political activities. I am (p. 6) the National Chairman of the Libertarian Party at this time, as well as Chairman of the Coloradans for Free Enterprise, one of plaintiffs in this case.

Q What is Coloradans for Free Enterprise?

A Coloradans for Free Enterprise is a non-partisan group founded in 1982 as a for-profit corporation, and its purpose was to promote free market solutions to problems here in the State of Colorado.

Q Is Coloradans for Free Enterprise incorporated under the State of Colorado?

A It is, and as far as I know it is up to date with all its filings.

Q Are you an officer or director?

A I am a director. I am Chairman of the Board of that organization.

Q Is Coloradans for Free Enterprise sponsoring a proposed initiative?

A Yes.

Q Would you describe that initiative?

A The initiative is briefly to deregulate Colorado's transportation industry, and the method is by constitutional amendment to prohibit the finding of transportation companies as public utilities, therefore getting them out from under the Public Utilities Commission of Colorado, which is now charged with their regulation.

(p. 7) Q You mentioned by background and profession you are a chemical engineer. Does that professional background relate specifically to this proposal?

A Not in any way.

Q I would like to hand you what has been marked for identification as Plaintiffs' Exhibit 1.

The Court: The clerk will do that, Mr. Danks. She will have all the exhibits, just ask her.

Mr. Danks: There is only one, Your Honor.

Q I ask you if you can identify that exhibit?

A I recognize it as our petition.

Q Is that a true and accurate copy of the original petition?

A I would say that it is, except that the red ink came out in black.

Mr. Danks: All right, at this time, Your Honor, I believe it has already been stipulated.

The Court: It is received in evidence.

(Plaintiffs' Exhibit 1 received in evidence.)

Q Would you describe just generally and rather briefly the process that you went by in order to get this petition in the position that it is in now?

A Well, the first time we did it, before drafting the initiative, was look for a group of people to support it, broad-based group of citizens, and we wanted their input in the drafting, so we had something which was acceptable to a large group of people.

(p. 8) We had involved in that process transportation attorneys, members of the transportation industry, members of Coloradans for Free Enterprise, and members of the Colorado Legislature.

After going through several rounds and versions of drafts of potential language, we settled on the language which is included in this petition. We had to submit that to the Secretary of State's office for setting on the ballot summary, which we did. That was approved. There was no challenge to that language.

We went out and printed our petitions after that.

Q You hoped to have it on the ballot in November of 1984?

A We hope very much to do that.

Q And in order to do that, you have to obtain a certain number of signatures?

A Yes, the number is something on the order of 46,700 signatures, which requires an additional cushion of 10 to 15 or probably 20,000, to make sure you have enough valid signatures or registered voters.

Q By what date do you need those signatures?

A August 6, 1984.

Q You mentioned there was a broad base of supporters for this. Would you identify by name and political parties some of the principals.

A Well, the primary supporters of this initiative who are listed on our letterhead as endorsers, I will go through as best (p. 9) I can from memory. Nancy Bigbee, a transportation attorney. State Representative Frank D. Phillipo, a Republican from Jefferson County. State Senator Barbara Holme, a Democrat from Denver. State Senator Don McManus, Democrat from Adams County. State Representative Ruth Pendergast, Republican. State Representative Pete Menham from Colorado Springs. Bill Womack, a member of the RTD board. Bili Rourke, the Colorado Chapter of National Association of Independent Businesses. Patrick Lilly, Chairman of the Colorado Libertarian Party. Spencer Soame, head of Coloradans for Alternative Transit, and a few others on that letterhead whose names I don't recall.

Q In obtaining the petitions, could you describe what you have personally done. Have you actually gone out and asked people to sign a petition?

A In this case?

Q In this particular case.

A Yes, I have collected over 400 petition signatures as of today.

Q Would you describe your experience?

A In going out and soliciting signatures?

Q Yes, on this particular proposal, if you can relate as to what explanation—what did you explain to the petition signer?

A On May 19th and May 20th of this year, I petitioned at the Capitol Hill People's Fair, held in Denver every year. On May 19th, I petitioned and got approximately 160 signatures, and one (p. 10) of the interesting things about petitioning on that day was that it was my birthday, but the way that we go about soliciting signatures

is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them and ask them, "Are you a registered voter?"

Many people say, "I haven't got time, don't bother me," or "Yes, I am, but it is none of your business," or "Yes, I am, so what?"

If you get a yes, then you tell the person your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, "Please let me know a little bit more." Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from PUC regulations.

Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign. If they say yes, you get them to sign. If they don't, you say, "Thanks, have a nice day."

If they are—I say I referenced May 19th as my birthday. I was extra successful that day by saying, "Please sign, today is my birthday," and most people said, "Well, if had said that right away, I would have signed right away. You wouldn't have had to go through most of this."

Q In a more serious vein, what have you tried to explain?

A Tried to explain the not just deregulation in this industry, that it would free up the industry from being cartelized, allowing freedom from moral choices, price

competition for the first time, lowering price costs, which we estimate prices in Colorado to be $150 million a year in monopoly benefits. We have tried to convey the unfairness and injustice of the existing system, where some businesses are denied to go into business simply to protect the profits of existing companies.

We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them.

So, the liberals—if we can spot a liberal, sometimes we can, we made the argument we are trying to break up the monopolies, trying to help the small businessman, and the minorities are being hurt the most, truckers of minorities.

To conservatives, we tried to point out this is a free enterprise issue. This is an issue of free market, and getting the government out of a business it has no business being in. We have also used the argument, which is also very compelling to many people, that this is simply—"We are simply asking for your signature to place this issue on the ballot, where the voters in November can decide yes or no, whether it is a good idea." And in favor of that is part of the democratic process.

(p. 12) And we, in conjunction, mention the fact that there have been repeated efforts to do similar work with deregulation through the Colorado Legislature, but those bills have been bottled up in committees, and heavy lobbying pressure, and lots of dollars have been spent in keeping those bills from reaching the floor.

So we have a whole raft, whole array of arguments. We have specific cases of people who have been hurt and denied the right to go into business, or put out of business by the competitors, in addition to what you might refer to as the frivolous arguments, which sometimes help to help a person make up their minds and put pen to paper.

Q What percentage of the people you have approached, in your estimation, have actually signed the petition?

A Well, in my experience, I would say that perhaps 70 percent, and that's probably being generous, maybe 60 to 70, people you approach say they are registered voters in the State of Colorado, and of those that say they are, some don't have the time to talk to you. Maybe 80 percent will take the time to listen. Of those who actually do listen and are registered voters and eligible, probably 65 to 70 percent of those people are persuaded to sign the petition and do so. It is not a very difficult process, once you find a person who will listen to you and is qualified to sign.

Q Has the required 46,000 plus signatures been obtained as of (p. 13) today's date?

A No, it has not. To my information, we don't even have that many petitions out right now.

Q Can you give us a rough estimate on how many signatures you have at this point?

A I would say we have between 10 and 15,000 collected signatures at this time, and we have over 30,000 signature lines in the hands of petition circulators at this time. We don't know how many of those are filled in and how many are not.

Q Have you paid anyone to sign the petition?

A No, I have not.

Q Do you desire to have anyone be paid for actually signing their name to a petition?

A No, I don't—I do not.

Q However, you do desire to pay the petition circulators?

A Yes.

Q Is that correct?

A Yes.

Q Do you personally desire to be paid for your time in circulating petitions?

A Not really. I would like to be able to pay them so that I have time to go back to my work.

Q If you were paid, would you devote more time to it?

A If I were paid, I could afford to devote more time to it, and I would do it.

(p. 14) Q Well, if you were—

A I would accept it on a paid basis, if that was the only way I could be out there, and that was necessary to get it qualified.

Q All right, now, we are in court asking the Court to allow you to pay petition circulators. If this Court should grant our relief, what effect would that have on your petition drive?

A I think it would allow us to qualify our petition drive for the November ballot, if we were allowed to pay petitioners.

Ms. Gartland: I would object on the ground that the answer is speculative, Your Honor.

The Court: Overruled.

A (Continued) I—I specifically think that it would allow us to get enough people out circulating petitions to where we could easily manage within the remaining six weeks to collect the necessary signatures. It would allow us to offer the incentive for people to go out there and put out the greater than 50 percent rejection percent, because even with 80 or 70 percent being registered, 80 percent talking and 70 percent you approached actually signing, that's only about 40 percent actually do. It's a very negative thing. I think it would help overcome that.

Q Have you personally been involved in recruiting circulating petitioners?

A Yes.

Q What do they say?

A People who have before say, "I hate petitioning." People (p. 15) who haven't say, "I don't think I can do it. What is it?"

What you are asking people to do is go out and intrude on strangers and intrude on their privacy and beg them for something which you have perhaps good reasons to ask them to do. Most people I attempt to recruit don't — say they don't have confidence in their ability to articulate the issue or to confront people directly, so we

find it a very difficult thing, and I would say of the people we solicit to get involved with the petition, maybe 10 to 20 percent do contribute some time, and maybe 10 percent of those contribute large numbers of hours.

Q Have you been involved in other petition drives, other than this one before us today?

A Yes, I have.

Q Would you describe your broader experience?

A I have been involved in excess of 100 petition drives in the last eight years, throughout the United States. My first petition drive was in 1976, where I was volunteer circulator in New York, on the McBride for President, Libertarian issue, and since that time have been involved in other Libertarian Party petition drives, as well as three times in Colorado I have run for public office. Each time I have had to circulate petitions to get myself qualified for the ballot.

In 1980, the Libertarian Party ran about 33 petition drives. I was on the national committee which was managing the affairs of the party and running those drives.

(p. 16) In 1982, the party ran probably 20 petition drives around the country. I was the chairman of the Ballot Drive Committee.

In 1984, I am the National Chairman of the Libertarian Party, and we are running 33 petition drives across the country to get our presidential candidate qualified.

In addition to that, I have worked on other candidate petition drives as a circulator, and other initiative petition drives as a circulator.

Q In working in other states, have you been involved in petition drives for which petition circulators were allowed to be paid?

A Yes, I have.

Q Would you relate that experience, specifically in terms of the effect on the petition drive of having paid circulators?

A My primary experience with paid circulators is is in 1980, '82 and '84, in qualifying Libertarian candidates for the ballot. The Libertarian Party pays for ballot drives in roughly 25 states in the United States, and I know of no state which prohibits us from doing that to qualify our candidates where we are doing it.

In a few of the other states where we do petition drives, we do it by volunteers. In the states where we pay the petition circulators—I will name a few, Texas, Pennsylvania, Florida, Georgia, Oregon, California, in the past, although now (p. 17) we are permanently qualified, and those states where we have to pay, we pay as many people as we need to supplement the local volunteer force.

We have in 1980 achieved ballot status in all 50 states. I would say we spent roughly $300,000 qualifying our presidential candidate through paying petition circulators in 1980, and this year the Libertarian Party has budgeted in the presidential campaign $200,000 for bal'ot drive assistance, the primary purpose to pay petition circulators.

Q You may have mentioned the states, but generally how many states allow petition circulators to be paid and how many require them to be volunteers?

A To my knowledge, we have run into no state which is prohibiting us from paying petition circulators today. Oregon did in the past, and we challenged the constitutionality of that act, and we can now pay petitioners in Oregon, but to my knowledge there are no other states which are restricting our ability to pay petition circulators on behalf of our candidates.

Q None other than Colorado that you know of?

A Well, none other than Colorado. We haven't—we don't normally have to consider that as an additional barrier to getting a ballot qualified. Usually our primary burden is the deadline, the quantity of signatures required and the time frame in which they are available, matched against the local volunteer force and the local financial resources.

(p. 18) Q In more or less being in charge of petition drive, or specifically this petition drive, how do you go about maintaining the integrity of the signatures you obtain?

A Well, anybody that has been involved in petition drives, has a lot of experience in them, knows that frequently and most typically if you have, for instance, a petition circulator forging signatures, it is self-evident.

You look at the piece of paper and notice similar handwritings. Even if they do that with five people sitting around a room, you notice the similarity. We have caught circulators copying phone books, caught them writing in groups of five, caught them putting signatures onto the petitions, and we simply know that it is in our best interest to catch these things before we submit them, because it

does us no good to submit invalid or fraudulent signatures, and may wind us up in serious problems.

We have had petition drives that have had problems, some unpaid and some paid, and in 1980—no, 1976, in Florida, we discovered a situation like this that cost us ballot status. We never submitted the petition because we discovered at the last minute some of our signatures were not in proper order.

Is that just in regard to pay drives, or volunteer?

Q I would like you to discuss volunteer as well.

A I assisted as a volunteer in collecting petition signatures in 1982 on an initiative in Colorado, which was later disqualified (p. 19) because of improper circulation procedures, and that was a casino gambling initiative, where I got a few signatures to help out in the response to that, and that petition was eventually disqualified, and the circulator, despite our best attempts to advise on proper procedures, wound up in court.

Q What motivates people to carry around a petition and ask for signatures on it?

A Well, in the Libertarian Party, the primary purpose for doing the petition drive is to get our candidate on the ballot, in order to espouse our views. In initiatives, it is sometimes simply that people want to put an issue in front of the people, to bring it to public awareness, and debate that it is a problem. Sometimes they want to change the law, and in my experience, most of the drives I've been associated with, the primary motivation is that people believe in the justice and rightness and morality

of the cause they are supporting. They have very strong personal motivations.

Now, when you hire petition circulators, sometimes you hire motivated circulators, and sometimes those who aren't as motivated.

Q Can money be a motivating factor?

A Money is very definitely a motivating factor to get someone to work on behalf of an effort, a matter of raising the demand and you get more supply. You pay people. You pay them more. You get more people able and willing to do it. Many of the (p. 20) people that I work with in the Coloradans for Free Enterprise, most of them—well, the majority of the people I work with in the Libertarian Party are people who have jobs, and they either have jobs or don't have jobs. If they do have jobs, they can't afford to take time off to work on the drive. If they don't have jobs, and they are looking for them, they can't afford to be volunteers. So money either enables people to forego leaving a job, or enables them to have a job.

Q And is there indirect financial interest? In other words, do you have trucking companies—

A Yes, we have limousine companies, trucking companies, potential cab companies, potential business people, people not in the business who are supporters and working on this, and they are working on it because they think it will give them an opportunity to either start their business or in some cases to expand their existing businesses, so they definitely have an economic interest in the outcome of this measure, and they are supporting us.

Q Were you in Colorado during the branch banking or the wine in the grocery store initiatives?

A Yes, I was.

Q Would you contribute, based on your experience or your observations, the motivations of those petition circulators, on their connections, say, with the banking industry and grocery store business?

(p. 21) Ms. Gartland: I would object, Your Honor. He is asking the witness really to read the minds of people.

The Court: Sustained on foundation.

Q Did you observe petition circulators in connection with the wine in the grocery store initiative?

A Yes, I did.

Q And where did you observe petition circulators?

A In King Soopers and Safeway grocery stores.

Q Who was actually doing the petition circulating?

A I asked some of these people, and they were typically employees on their day off, employees of the grocery stores, where the petition tables were set up within the grocery stores.

Mr. Danks: May we have just a moment, Your Honor?

The Court: You may.

Mr. Danks: That concludes my direct examination, Your Honor.

The Court: All right.

CROSS-EXAMINATION

By Ms. Gartland:

Q Mr. Grant, approximately what time was the organization which is sponsoring this particular petition drive formed?

A Coloradans for Free Enterprise was formed as a corporation, was formed in 1982. Now, we have formed a political committee, and I don't recall the exact date, which is the official sponsor of this initiative, and files its reports, Coloradans for Free (p. 22) Enterprise and Transportation. I don't know that—that's within the last year.

Q You said the first thing you did in the course of your petition drive was to look for a group of people to support the issue. Do you remember approximately when you began those efforts?

A I would say in—we began them in an active public way in June of 1983, with our first public meeting, with State Senator Don McManus addressing Coloradans for Free Enterprise, members of the press and members of the public and members of the transportation industry, at an event here in Denver.

Q When did you submit your petitions in the Secretary of State s office for ballot title designation?

A Probably sometime around January, but I can't recall.

Q When did you request a hearing before the Secretary of State to have your title designated?

A That's when you submit—that is a request for a hearing.

Q At the time it was submitted.

A Yes. Well, first, you go to the Legislative Drafting Office to get their comments. We did that in December.

Q And you believe you have filed your petition with the Secretary of State's office in January of this year?

A Perhaps late January, perhaps February, early February. I'm not certain.

Q Are you aware that—that the—there is no initial time (p. 23) period within which you have to submit your petition to the Secretary of State's office?

A Yes, I am aware.

Q It could have been submitted in January of '83, for that matter?

A That's correct.

Q Now, are you aware that your six months from—for getting the sufficient number of signatures begins to run from the date that the Ballot Title Board fixes the title?

A Yes, I am.

Q And when did the Ballot Title Board fix the title, in your case?

A I don't know the date. I think it was in March.

Q Does the date March 14th sound correct?

A Sounds approximately right.

Q So you had a total of four and three-fourths months in which to get sufficient signatures?

A In which to collect signatures, yes.

Q So you haven't utilized the full six months that the statute allows you to collect signatures, would that be correct?

A No, that's wrong.

Q You have utilized the full six months?

A Yes, we have. Well, no, I'm sorry. I thought you said since the time we started.

Q No, from, as I understand it, or as we agree, under Colorado (p. 24) law, the six months for getting signatures begins to run from the time the Ballot Title Board fixes the title?

A Yes.

Q You actually were approved for circulation on March 14th?

A Yes, that's when we began.

Q So you have not utilized the full six months available under Colorado law?

A It wasn't available to us this year.

Q It would have been available, if you had—

A Yes.

Q —gotten an earlier date from the Secretary of State's office?

A Yes.

Q Has anyone within your organization, Mr. Grant, been given responsibility to recruit volunteers to circulate the petition?

A It is a specific responsibility of Lori Massie, the Executive Director of Coloradans for Free Enterprise. It is my responsibility. It is the officers of our organization's responsibility, and it is the responsibility of every person who would like to see our initiative on the ballot who is associated with our efforts.

Q Is Lorie Massie a paid employee of the organization?

A She is a commissioned fund raiser for the organization.

Q So is she paid for her efforts?

A She is paid on the basis of her success at fund raising.

(p. 25) Q Is she compensated for her time in attempting to recruit volunteers?

A No, she is not.

Q Is it your understanding that Colorado law would allow her to be compensated for her time in recruiting volunteers?

A Yes.

Q Are you paid for your efforts in recruiting volunteers?

A No, I'm not.

Q And do you agree that Colorado law would allow you to be paid for such efforts?

A Yes, I do.

Q With regard to your personal experience in recruiting vouunteers, what kind of people have you talked to?

A I have talked to—Republican legislators. I have talked to Democrat legislators. I have talked to members of the transportation industry, either providers of transportation services or users of transportation services, as the companies that ship goods and services. I have talked to Libertarians. I have talked to people on the street when I circulate petitions—sometimes you find a person. I have talked to people who have been turned down for PUC licenses, because they know about the benefits of deregulation. I have even talked to a Yellow Cab driver.

Q And you have run into a problem on these individuals not feeling confident about confronting the public and explaining the (p. 26) merits of the issues?

A Not feeling that they—not feeling confident in their own ability to handle that direct a contact, with the —added—it's not just a contact, but it is a persuasive contact with a stranger, yes.

Q With regard to your experiences in other states using paid circualtors, what were the circulators on the average paid? What amount of money?

A That varies, according to the exigencies of the situation. Very late in the ballot drive, it is very urgent, the pay goes up. Anywhere from 25 cents a signature to $1 a signature, in some cases. In other cases, they are simply paid by the hour, probably up to $10 an hour, for their efforts very late in the petition drive, when the demand is high and the supply is limited.

Q Okay, have you personally retained or hired individuals in other states to circulate petitions?

A Not directly. I authorize it. I do not hire them.

Q Who has done the hiring?

A Our local petition managers, petition drive manager.

Q And are you aware of what the hiring process is to get these individuals?

A Yes, I am.

Q What is that process?

A First, usually starts with contacting local—all the local (p. 27) Libertarians, by phone or by mail, if it is a Libertarian Party, or if it is an initiative drive, working with some other base group.

We normally contact the party list first, if it is a party drive, not paid, and if they won't volunteer, we talk about paying them, and see what we have got. We take our requirements versus our volunteer effort, and then we go out and try to hire the balance, and simultaneously raise the money to pay for it.

We then probably normally would start putting ads up on bulletin boards, on college campuses, running ads in local newspapers. I don't think we have ever bought any media, broadcast media time, to advertise that. Might put up a—put a small ad in the Shopper's Guide, or something like that, try to advertise to find people who are interested in working as paid circulators.

Q Generally, these people who are not associated with the organization, like college students, how much they paid for their time?

A The same as anyone else, and I have already mentioned that. The rates are on production, not on affiliations.

Q You have referred to some problems you have had with forgeries. You mentioned briefly an incident where you caught circulators writing in groups of five. Would you explain more specifically what happened there?

(p. 28) A That's simply where a group of people sit around in a room, five of them. A petitioner circulator will perhaps get together with four friends, sit down in a room, and they will write in different handwritings consecutive names. They will pick them from some source. Might have a phone book. Or a registered voter list.

Q Where did that occur?

A Occurred in several states. In Florida, in Texas, to my direct knowledge. It occurred in several other states, as far as I've been told, but I wasn't personally aware of.

Q You mentioned an incident where circulators were caught going through phone books. Would you explain that incident a little further?

A Petition circulators, found it very difficult to solicit people on the street. They found it easier to solicit the phone book for potential supporters, and they just assumed, I guess, that the people in the phone book were voluntarily signing, and just simply copied them out of the phone book, and it is easy to spot.

Q Where did that occur?

A That occurred in Florida, in 1976.

Q Of—

A It occurred—never mind, excuse me.

Q Who were the individuals involved in that incident?

A By name?

(p. 29) Q No, by—were they associated with the Libertarian Party?

A Yes.

Q Were they paid?

A Some were and some were not. We had both involved in the incident.

Q They were working together as a group?

A I think we had separate incidents that were not coordinated in that time in 1976.

Ms. Gartland: I have no further questions of this witness.

The Court: Very well. Mr. Danks?

Mr. Danks: No questions, Your Honor.

The Court: Thank you, Mr. Grant. You may step down.

Mr. Danks: Your Honor, at this time I move the Court to take judicial notice of three Colorado statutes. Those are CRS 1-40-110, CRS 1-13-106, and CRS—

The Court: Wait a minute.

Mr. Danks: 106.

The Court: All right.

Mr. Danks: And 1-40-119.

The Court: Any objections?

Ms. Gartland: No objection.

The Court: Notice will be taken.

Mr. Danks: The purpose of the judicial notice is that each of those statutes makes it a specific criminal offense to (p. 30) either forge, misrepresent or to pay someone to sign a petition.

The Court: Very well.

Dr. Danks: At this time, I would like to call Lori Massie.

LORI MASSIE

called as a witness by the plaintiffs, being first duly sworn, on her oath testified as follows:

The Clerk: Please state your name and address for the record.

The Witness: My name is Lorie Massie. I live at 6541 Kilimanjaro in Evergreen.

DIRECT EXAMINATION

By Mr. Danks:

Q Would you relate your background, just briefly, in terms of your education and work experience?

A Okay. I went to college in Florida, the University of South Florida. I have a B.A. in fine arts. Then I went to work in a manufacturing firm, for which I did the marketing.

Q. What background do you have in marketing or in sales-type work?

A Well, it goes back a long way. One of the first things that I ever did was sell sewing machines, so I have a sales background in that. Then I started my own plant business, where I would sell plants door to door, and then I went to work for a company who had sales in both the United States and overseas, and I (p. 31) handled everything from the advertising to marketing for them.

Q Let me jump straight into the petition drive. How does your sales background relate, if it does, to the act of obtaining signatures on petitions?

A Well, one of the things about sales is very often you have to approach someone cold, like a cold call. You go up to someone who is not familiar with you, doesn't know you, is not really interested in what you have to say, so my experience in the sales end of it has allowed me to know what kind of responses you can get and what kind of rejection rate you do get from that.

Q Now, how is the circulation of a petition like selling something?

A Well, when you go up to someone, whether it is to sell or to ask them for something, you are invading the space that people generally feel is a correct distance to stay from one another. Individuals in the United States don't very often like to be approached by people. They are

solicited for all kinds of things, through the mail, on the phone, everpwhere, so to a certain extent, in my experience, they are wary of someone coming up to them and asking them for something, or to their doorbell, or to them on the street, or by phone. So the same thing is true, whether you are going to ask them to buy something or whether you are going to ask them for their signature.

Q What is a blind sales call?

(p. 32) A A blind sales call is when you go up to someone who has no previous knowledge of you or your company, or your product or what it is that you are trying to sell. It is called a cold call, and as opposed to a lead, where they have some sort of previous dealings with your company.

Q Which type of sale is easier, a lead, when it is—

A Oh, leads are definitely much easier to do.

Q And would you describe a petition circulator's job as being a blind sales call?

A It is definitely a blind sales call. It is an individual going up to someone they don't know and trying to ask them for something of a total—totally cold, with no background at all.

Q Well, does someone in charge of a sales force have a need to kind of bolster his salesmen before he sends them out?

A Yes, if you are in charge of sales people or circulators, it is very, very important to constantly pat your sales people on the back, to let them know that it is okay that you got rejected 50 times today, that it is not the

ones that are rejecting, it is the ones that you get that count. That's one of the reasons why sales people, good sales people, are paid quite a bit, because there is a very high rejection rate, and it is a very painful process to go out cold and ask people for things.

Q What motivates a person to sell a product or service?

A I would say money, more than anything else.

(p. 33) Q In your experience—maybe I better back up. What is your experience on petition drives?

A Okay, I have been involved in three different drives. One, very briefly, just as a volunteer. I was involved a little bit more in the one in Florida, which was to get Proposition One on the ballot. I was—I spent a lot of time in the county group that was working in that area, not on a state level, but in the county.

Q Are you involved in this effort to deregulate motor carriers in Colorado?

A Oh, yes, I am.

Q What involvement do you have?

A Well, I am in charge of the functioning of getting this thing on the ballot. Recruiting people for the ballot drive. I'm also responsible for raising money for the effort.

Q Are you being paid at all for your efforts ?

A I get a percentage of what I raise.

Q As a practical matter, how much have you made?

A I was going to try to figure it. I think it comes to about a nickel an hour now. I have gotten $529 over three months, and part of that is because I feel it is more important to get it on the ballot than to raise money, because—getting on the ballot means our success with it.

Q Do you wish to either—well, let me break the question down in two parts. Do you wish to be paid for your work in (p. 34) actually going out and having people sign petitions?

A Yes, I would like tc do that.

Q And would you correspondingly desire to be able to pay people?

A Yes, I think as a coordinator I know that would make the success of this event positive, rather than perhaps a failure.

Q So it is absolutely clear, and maybe obvious, but you aren't asking to be able to pay the person for signing the petition?

A No, no, just I would like to pay the people who are going to go out and gather signatures.

Q All right, now, I diverted on that background. I was asking you about what motivates salesmen, and I would like to ask you what would motivate a petition circulator?

A A petition circulator can very easily be motivated by money. If he knows he can collect money for his efforts, he is far more likely to spend six hours a day at it, than he would otherwise. The way it is right now, it is kind of a painful process to go out there and stand

and ask people to sign something, and after an hour of being beaten over the head with "no's" or "drop dead" or whatever, if they were being paid and they knew that their success would relate to their pay, they would work on it. They would probably polish up their techniques also.

Q What types of rejections have you encountered from people (p. 35) as you approach them to have a petition signed?

A Okay. Several. One, I have been waved away before I even got up to ask them whether they are registered to vote or not. I have asked them if they are registered to vote, and they say, "Yes," and keep walking on by. I have asked them if they are registered to vote, and they say, "Yes, and—but I don't have any time right now."

Some of them are not registered to vote. Some don't live in the state. Some say, "Yes," and after I go through my whole spiel, I find they are not registered to vote in Colorado. They just wanted to hear what it was I wanted to say.

People have said, "This issue—I don't know enough about this issue. I can't sign it right now." Maybe he is a member of the union, and I have to discuss with him the—why this is—isn't this going to be a union buster or something. All kinds of reasons. Some are simply afraid to sign their name. They don't know what it is. The several sheets of paper with the big red warning, they look at that, and it scares them off.

Q For example, you mentioned the union issue. Give me an example of the dialogue you have had with a union member reluctant to sign a petition.

A Okay, I have had several conversations with people in unions. One of the most pressing problems that they see is that they view this as a way to bust up unions, and they say that if (p. 36) anybody can get into the business, then, you know, we won't be able to control closed shops, and this and that and the other, and an argument I make to that is, well, there is no evidence to show that the existing companies are going to be in any kind of problem, whether they are union or not. If they are good at what they do, deregulation is not going to hurt them. Sometimes it works, and sometimes it doesn't.

Q If you had a thousand dollars to spend on this deregulation of motor carriers, and you wanted to get the most signatures in effect for your thousand dollars, would you run a thousand dollars worth of ads, say the Rocky Mountain News, or would you spend a thousand dollars on petition circulators?

A I would put every penny of it in petition circulators.

Q Why is that?

A Because it is a direct way of reaching people, rather than having an ad in a paper that asks people to support us, and then somehow expect those people to go out and find our circulators, wherever they may be. This is a direct way of having a one-on-one confrontation with an individual who wants to get it on the ballot, and a potential signer. Much more effective that way.

Q There is nothing in the law to prevent you from running an ad in the newspapers?

A No.

Q What about having, say, a pizza party or something like (p. 37) that to reward the workers?

A It's my understanding we can't do that. That's compensation.

Mr. Danks: May I have just a moment, Your Honor?

The Court: You may.

(Counsel conferred.)

Mr Danks: Very briefly, Your Honor.

Q Ms. Massie, you have been involved in recruiting petition circulators for this drive?

A Yes, I have.

Q What types of individuals have you been able to recruit to go out and actually circulate petitions?

A Several different individuals. Some of my most successful ones are those who are perhaps related to the industry, individuals who—well, one man particular just recently got denied a license to start his business, so he is helping with that. I have a woman who was denied several years ago, and she is helping just—I don't know, maybe revenge or something.

I have small trucking companies, people who want to be in limousine service, cab—tiny cab companies. All those individuals are helping with the drive.

Q If this were passed, in other words, if in November we have this initiative on the ballot, and it passed, and the motor carrier industry was deregulated, then these companies would be able to go into business?

A Oh, yes. Some of them are specifically doing it, knowing (p. 38) that if this were to win, they could greatly expand their business, or go into business.

Q So, while they are not paid directly, they may have a financial reward at the end?

A Yes, sir

Mr. Danks: I have no further questions, Your Honor.

The Court: All right.

CROSS-EXAMINATION

By Ms. Gartland:

Q Ms. Massie, you made the statement that it is more important to get—at this time, it is more important to get the measure on the ballot than to raise money. Could you explain what you meant by that statement?

A Well, the way it is set up right now, if I raise money, I can't spend it directly in getting people on the ballot, so I have spent most of my time and effort making sure that I have enough signatures to get on the ballot, and right now, you know, raising money is not going to do me any good.

Q Are you paid for your time spent trying to recruit people getting signatures?

A No.

Q Would you like to be paid for that time? I guess that's not a fair question.

A Well—

Q Probably—

(p 39) A I'm sure—

Q Okay, you have—

A I'm not sure—

Q You made the statement, based on your experience in sales and working with sales people, that money motivates them more than anything else, which I suppose is the general understanding. If you hired someone to collect signatures and paid them on a per signature basis, say 50 cents a signature, would he not, if he is or she is a good sales person, then be interested in getting as many signatures in the shortest amount of time possible?

A Yes.

Ms. Gartland: I have no further questions. Thank you.

Mr. Danks: No questions. Your Honor.

The Court: Thank you, Ms. Massie. You may step down.

Mr. Danks: May I have one minute before calling the next witness, Your Honor?

The Court: You may.

Mr. Danks: Mr. Ed Hoskins, please.

ED HOSKINS

called as a witness by the plaintiff, being first duly sworn, on his oath testified as follows:

The Clerk: Please state your name and address for the record.

The Witness: My name is Ed Hoskins. I live at 150
(p. 40) South Clarkson, Denver, Colorado.

DIRECT EXAMINATION

By Mr. Danks:

Q Mr. Hoskins, what is your occupation?

A I am a Certified Public Accountant

Q What is your educational background to qualify you for that profession?

A I have a Bachelor's degree from the University of Illinois, and I have the requisite accounting hours obtained at the University of Colorado and Metropolitan State College.

Q As a Certified Public Accountant, do you have to pass a specific examination?

A Yes.

Q Actually, a series of examinations, isn't it?

A Well, it is a multi-day examination, with several parts.

Q Do you have your own firm, or are you with others, or what's your CPA firm like?

A I am a sole practioner, in business for myself.

Q Are you a plaintiff in this lawsuit?

A Yes, I am.

Q What connection do you have with this effort to deregulate motor carriers?

A I am a member of Coloradans for Free Enterprise, and from the very beginning, since last spring, have been interested and—I think enthusiastically so, about the prospects of this (p. 41) initiative and about the results that it would—would be there, if we won.

Q Are you a registered elector in the State of Colorado?

A Yes, I am.

Q Based upon your experience, and this may be asking the obvious, but can people be motivated by money?

A Yes.

Q And give me some examples, as a CPA must experience, of people motivated by money.

A Yes, I guess I'm like everyone else, most aware of my own motivation by money. I'm in the business I am in, I'm in the profession I'm in, because, for one reason, I thought it would be a lucrative one, as well as one I would enjoy doing.

Q And I don't mean to cast aspersions on your character, but just to get a clear record here, does the fact that you are motivated by money cause you to violate the law?

A No. No, I have no desire to be brought into this court or any other on a criminal charge.

Q Do you desire to be able to pay circulators of petitions in connection with this drive?

A Do I desire to pay circulators?

Q Yes.

A Yes, I—I have been—if I could elaborate, I have been spending a lot of my time away from my practice, trying to help get this on the ballot, and a lot of valuable time away from that (p. 42) practice, and I would much rather take a fraction of my fee, that I might be earning otherwise, and pay a college student, for instance.

Q So, you have actually been out on the streets, so to speak, circulating the petition?

A Yes.

Q And you feel you could make more money at your CPA practice and hire someone else?

A I know I can.

Mr. Danks: I have no other questions, Your Honor.

CROSS-EXAMINATION

By Ms. Gartland:

Q Mr. Hoskins, recognizing that taking time away from your practice involves a fair amount of personal sacrifice, why are you doing it? Why are you out there circulating petitions, if you are not getting paid?

A The reason I'm out there is I feel there is a great need in Colorado to open up the transportation industry.

Q So you believe in the merits of the measure, in other words?

A Certainly.

Q And I assume you wish to convince other people that the—of the merits of the measure?

A Yes.

Q At least, enough to get it on the ballot?

A Yes. I—yes.

(p. 43) Q Do you find yourself in your efforts discussing the various provisions of the law, the proposed law, with members of the public?

A Yes, I do.

Q Does your familiarity with the measure, the fact that you were involved in drafting it, the fact that you believe in it, help you explain to the public why it is a worthwhile venture?

A Yes.

Ms. Gartland: I have no further questions.

Mr. Danks: No further questions. We rest our case.

The Court: Thank you, Mr. Hoskins. You may step down. Do you have witnesses to present, Ms. Gartland?

Ms. Gartland: I do, Your Honor. I would like to request a brief recess, if I may.

The Court: Very well, we will take five minutes. You may announce.

(The Court recessed from 9:40 a.m. until 9:50 a.m.)

The Court: You may proceed, Ms. Gartland.

Ms. Gartland: For our first witness, Your Honor, I would like to call Mrs. Betty Chronic to the stand.

BETTY M. CHRONIC

called as a witness by the defendants, being first duly sworn, on her oath testified as follows:

The Clerk: Please state your name and address for the record.

(p. 44) The Witness: Betty M. Chronic, 4705 Shawnee Place, Boulder, Colorado.

DIRECT EXAMINATION

By Ms. Gartland:

Q Mrs. Chronic, where are you presently employed?

A Department of State, for the Secretary of State.

Q And what is your position there?

A The Director of the Division of Elections and Licensing.

Q And how long have you held that position for the State of Colorado?

A That precise position for the State, since July 1 of 1977.

Q Okay, in your capacity as Elections Director, are you familiar with the records which show when initiative petitions are submitted to the Secretary of State's office for ballot title designation?

A Yes.

Q Would you testify, Mrs. Chronic, from your records, when the plaintiffs' petition, plaintiffs in this

case, was submitted to the Secretary's office, Secretary of State's office, for ballot title designation?

A The Secretary of State and the other two members of the Title Board are required to meet first and third Wednesdays of each month, if a draft has been submitted. The petition in this instance was submitted prior to—immediately prior to the February 15th ballot title setting meeting, and the ballot title (p. 45) was set on that date.

Q On February 15th?

A Yes.

Q So the ballot title meetings are the first and third Wednesdays of every month, is that correct?

A Yes, providing the draft—there must be a draft for them to consider.

Q Does the board, by law—does the board meet every month of the year?

A They can, if there's a draft. There is no requirement as to when an initiative may be started.

Q Okay.

A So, if a draft came over from Legislative Council, presented by proponents, the title setting board would be convened.

Q Would it be required to convene on the next Wednesday, either middle or last—

A Right, either the first or third Wednesday of the month.

Q So, the longest anyone would have to wait for a hearing would be two weeks?

A Two weeks.

Q Was the petition that was submitted by the—the petition of plaintiffs was heard by the board on February 15th, is that correct?

A Yes.

Q And the title was fixed on that date?

(p. 46) A Yes.

Q Would you examine, Mrs. Chronic, Defendants' Exhibits B-1, B-2 and B-3, and tell—identify for the Court the—the clerk will present them to you—what those exhibits are.

A B-1 is a copy of a log, this one is in my handwriting, 1978, and from the files on initiative drafts and referred measures, we generated this log in order to be able to track the processes going through the office. It was a handy reference tool, so this is an exact copy of what we have in our files.

Q And the document you have in your files is a regularly kept record of the Secretary of State's office?

A Beginning in 1978, it was. We found that many times people asked us for information, and we had to go back and dig out the individual file folders themselves and search through them. This was a method to keep track make it available to the public and ourselves, as to the process. So, beginning in '78, this was the process.

Q Would you also identify Exhibits B-2 and B-3?

A B-2 is the 1980 log, was kept by the administrative officer, who was working for the Secretary of State,

and the division which I had in reporting to me. Some entries are in her handwriting. Some are in mine. Depending upon which one of us was in fact handling that particular situation at the time, if she were on vacation or unavailable, and the person whose handwriting appears in most of it is Barbara Lilly, who is no longer there.

(p. 47) Q And most—and this is also a log of all initiative petitions submitted to the Secretary of State's office in 1980?

A Right.

Q What about Defendants' Exhibit B-3?

A That is the 1982 log, and again, the same process.

Ms. Gartland: Okay. At this time, Your Honor, I would like to move for admission of Defendants' Exhibits B-1, B-2 and B-3.

* * *

(p. 51) The Court: All right, the objection is overruled, B-1, 2 and 3 are received.

Ms. Gartland: Thank you.

(Defendants' Exhibits B-1, B-2, and B-3 received in evidence.)

DIRECT EXAMINATION (Continued)

By Ms. Gartland:

Q Mrs. Chronic, after the Ballot Title Board fixes the title, is there not one more thing that has to be done before the petition can be circulated?

A Yes, proponents must receive that ballot title, which they do the next day after the Title Setting Board meeting, mailed to them, and they are given the offer of picking a copy up. Then they must send that in, together with the summary set by the board, and a fiscal note, and they must prepare their petition format. That is again submitted to the division for review, and upon approval, then the petitioners may begin to circulate. (p. 52) That sometimes takes different amounts of time.

Q Once a petition format, after the title has been fixed and has been given to the proponent, and they submit it to have the petition in final form for its approval, how long on the average does it take your office to actually approve the petition format?

A We have been as fast as two hours and as long as five days, to the best of my recollection.

Q What's the average? Can you estimate?

A Less than 24 hours.

Q So, as a practical matter, then, the proponents have six months from the time the format is approved to get their signatures?

A That's right.

Q And the petition has to be filed at least three months before the election?

A That's correct.

Q So am I correct in my mathematics, to fully utilize the full six months, proponents should have their petition formats approved by February 6?

A Yes, that's correct.

Q Now, looking on Defendants' Exhibits B-1, B-2 and B-3, under the column "date format petition approved"—

A Umm.

Q Does it appear to you that most of the proponents of petitions in Colorado, in the last six years, eight years, or (p. 53) six years, excuse me, are utilizing the full six months available to them under Colorado law to circulate petitions?

Mr. Danks: Objection, Your Honor, the document speaks for itself.

The Court: Overruled. You may answer.

A Some do and some do not. There are a number, as you can see from the exhibits, that do in fact come and appear before the board after that early February date. A few do make it before that time.

Q Okay, is there anything that would prohibit a proponent from coming before the board to have a title fixed as early as December of the year preceding the election?

A No, if you will notice, Exhibit B-3 shows, under A that a ballot title set was—was set on the 15th day of April, in '81, for the '82 election.

Q So, as long as over a year and a half before the election?

A Yes.

Q Mrs. Chronic, have you, pursuant to my request, examined your records for 1978, 1980 and 1982, to deter-

mine the number of initiative petitions which were approved for circulation that obtained enough signatures to be placed on the ballot?

A Yes, in fact, I did do that.

Q For the year 1978, how many petition forms were approved for circulation?

A Five petition forms were approved, five ballot titles set.

(p. 54) Q How many of those five were actually circulated, according to your records?

A According to our records, one had no political committee formed, which meant they spent no money, reported no money. Therefore, we considered that four had a possible activity to circulation, and one petition was filed.

Q One of the four that was circulated actually obtained enough signatures to be placed on the ballot?

A Uh-huh.

Q For the year 1980, how many petition forms were approved for circulation?

Mr. Danks: Your Honor, I'm going to object on the grounds of relevancy.

The Court: Overruled.

A Ten petition forms were approved. Two additional ballot titles were set, but were withdrawn. The measures were withdrawn prior to that petition form approval.

Q Of the ten petition forms that were approved, do you know how many were actually circulated, or can you tell from your records?

A Again, from our campaign records, of performance records, of those ten, four had no committees formed, either pro or con. Six had possible activ ty for committees, four petitions were filed. Two were on the ballot.

Q So, of the six circulated, four reached the ballot?

(p. 55) A Right.

Q For 1982, how many petition forms were approved?

A Ten petition forms were approved. One ballot title was set, and was withdrawn prior to petition form. There were three that our records indicate that no committee was formed, three issues. Seven were possibly circulated. Of those seven, four petitions were filed. One, casino gaming, was removed by the Secretary of State for fraudulent circulation, and three were on the ballot.

Q Okay, so of the seven that were circulated, according to your records, four obtained enough signatures?

A Right.

Q But one of those four was disqualified?

A Right.

Ms. Gartland: I have no further questions of this witness.

CROSS-EXAMINATION

By Mr. Danks:

Q Ma'am, in your position with the Secretary of State's office, you are responsible for enforcing the election laws that come before the Secretary of State's office.

A I'm responsible for the administration of the election laws. Enforcement is—if you are speaking, Mr. Danks, in a criminal sense, no, our office is not responsible for that.

Q But you make sure that, to the best of your ability, that (p. 56) the petitions, for example, that you accept, comply with the law?

A Yes. Yes, we do examine them.

Q Now, you are a paid employee, is that correct?

A That's correct.

Q Now, in exercising your duties, you are a law abiding citizen and you don't violate the law, is that correct?

A That is correct.

Q Now, does the fact that you are paid for your work, in any way cause you to violate the law?

A I know of no way, that being paid causes me to violate the law.

Q Do you have any disagreement with the sort of capitalist principle that people should be paid for their work?

A Mr. Danks, I have no personal disagreement with that. I also have a disagreement that the term "volunteer" is not an acceptable one. I have spent a good portion of my life as a volunteer, and therefore I think it takes both kinds. I do volunteer work at this point. I am currently serving as a volunteer in a function.

Q But you have no—well, let me ask the question this way. You are appearing here as a representative of the Secretary of State's office, and it is your job to enforce the laws as they are written?

A My job to administer them as they are written.

Q And the law at the present time says that there can be paid (p. 57) petition circulators, is that correct?

A That is correct. That is not a decision, however, that would come to me as an administrator.

Q And as an administrator, you would be willing to enforce equally a law that says you could allow paid circulators?

A When I was employed by the State of Colorado, I had to sign a statement that I would—that I would abide by the U.S. and Colorado Constitution, and the laws of the State of Colorado. I will do that.

Q And if the laws change, you would follow the law?

A That's right.

Mr. Danks: I have no further questions, Your Honor.

Ms. Gartland: No further questions, Your Honor.

The Court: Thank you, Mrs. Chronic. You may step down. Next witness.

Ms. Gartland: Your Honor, at this time I would like to call Carolyn Sue Thomas to the stand.

CAROLYN SUE THOMAS

called as a witness by the defendants, being first duly sworn, on her oath testified as follows:

The Clerk: State your name and address for the record.

The Witness: My name is Carolyn Sue Thomas. I live at 7980 South Poplar Way, in Englewood, Colorado.

(p. 58) DIRECT EXAMINATION

By Ms. Gartland:

Q Where are you presently employed?

A At the National Center for Initiative Review, in Englewood.

Q And in what capacity are you employed by that center?

A I am the Executive Director.

Q Would you advise us all—am I correct, is it Mrs. Thomas?

A Yes, it is Mrs. Thomas.

Q What is the National Center for Initiative Review?

A The National Center for Initiative Review is a non-profit private corporation that was established in 1981 to study how states allow petition measures to achieve ballot status, and we look at all different kinds of provisions in the states that allow this type of law-making, and our information is available to anyone who is interested in this particular field.

Q What are the motivating factors that led to the establishment of the Center?

A Well, I think on the part of the original board of directors was that—a realization that there was no central

clearing house of information about the initiative process, and there hadn't been any kind of comparative analysis done of how the states managed the process, and so the National Center was set up, and started accumulating literature that was currently available, started doing some digging on our own to come up with information that was accurate about how the system works.

(p. 59) Q So, how would you describe the principal activities of the Center at the present time?

A The principal activity at this time is purely educational and research.

Q And that education and research, is it related specifically to the initiative process?

A Yes, although we do peripherally keep track of popular referendum and some recall activities. Our main concern is the initiative, whether it is a statutory initiative or constitutional initiative.

Q And in what localities do you study the initiative process?

A Well, we keep initiative activity of all 23 states that now allow access to the state ballots by initiative process, but in addition to that, we track legislative proposals in all 50 states, if they would somehow change the status quo of the initiative process in that state.

Q How comprehensive do you watch every single initiative petition in the country??

A Yes, we pick it up when it is filed into the system, and whatever the first legal requirement is by the state, whether that be Legislative Council or the Secretary of State's office. In some cases, in states where there is no

pre-filing required, then we still do depend on the Secretary of State's office to keep us informed as to what they knew is happening on an initiative campaign in the state.

(p. 60) Q Does the Center, in addition to tracking initiatives across the country, do research or study into the initiative processes that are at work in the states, in various states?

A You mean the individual provisions?

Q Yes, the different provisions that states have related to the initiative process, and does the Center do any research into comparing those provisions?

A Yes, we do, because one of the very first things that we found out was that there was a—there were very few universal truths about the initiative process, from one state to the other.

There are some very basic, across-the-board requirements, but even these changed. If we talk about the signature requirement, not only can the percentage of signatures change, but the base of that percentage requirement can change, and so even though you could go through and pick out all the requirements of the 23 states, it was not easily available information, and so we put together a chart in 1983 that has been widely distributed, that includes not only the 23 states that have a statewide initiative process, but we also tried to include non-initiative states, and show that, the correct amount, on it.

Q You began working at the Center at what time?

A In 1981.

Q What was your position?

A When I first began with the Center, I referred to it as a (p. 61) jack of all trades, but in August of '81, I took over the position of Research Director, which I had until March 15th of this year, when I kept the duties of Research Director and also assumed the title of Executive Director.

Q Would you summarize your educational background?

A Yes, I am a graduate of the University of Colorado at Denver. I completed all courses in December of 1980, and the degree was conferred on May, '81, and I am—

Q And in what field?

A I'm sorry, political science, and I have since then been enrolled at the Graduate School of Public Affairs, as a candidate for a Master degree in public administration. However, I am on sabbatical this year. I am not currently enrolled.

Q While you were Research Director for the Center, what were your primary responsibilities?

A Well, my primary responsibilities, of course, were to keep track of the initiative and legislative activity, concerning the—the nationwide happenings in the initiative field, but not only that. I have—it involves me to do public relations for the organization, to work with consultants, if and when you are called in, and just to do anything. Try to build our files, because one of our basic concerns is to build a very comprehensive library of literature available on the initiative process.

Q Does the Center do any research, or does it concentrate at all on the extent to which differing states' provisions affect the (p. 62) process as it has been historically viewed?

A We have done some publication of this type of information, in the newsletter that we do, called "Initiative Quarterly." Our work kind of pales in comparison to some of the work that has been done by Dr. David Mackelby, the leading academic in this field, and a person we work with.

Q Have you personally worked with Dr. Mackelby at any time?

A Yes.

Q When was that?

A When I came to NCIR. We discovered Dr. Mackelby almost immediately after forming the organization, because he was doing a Ph.D. dissertation at that time on direct legislation, and very early in our existence we formed an informal, and later formal, consulting arrangement with Dr. Mackelby, and I consider him my mentor and tutor in teaching me the basics of the initiative process.

Q And how long have you worked with him?

A Continually since then.

Q Where is Dr. Mackelby at the present time?

A He is at the Brigham Young University.

Q And what is his capacity there?

A He is an Associate Professor of Political Science.

Q And what is his reputation?

Mr. Danks: Objection, Your Honor.

Q I'm sorry, what is his specialty?

(p. 63) A His specialty is direct legislation.

Q By direct legislation, what exactly do you mean?

A I mean the process of—the processes that are available to citizens to petition their government.

Q And those include?

A The referendum, the popular—I'm sorry, the initiative, the popular as opposed to the legislative referendum, and recall.

Q In your capacity as Research Director, and now as Executive Director at the Center, have you been used as a resource by different agencies around the country?

A Yes, we—we get calls from a very diverse group of people, requesting information. We have started keeping track of these in a more formal manner than we did our first 18 months of existence, but, for example, during 1983-84, we have been contacted by I would consider the most major news agency in the country, including the three television networks, the McNeil-Lehr Report, Jack Anderson, Public Radio in Wisconsin, and New York, many of the leading newspapers, including the Washington Post and New York Times, L.A. Times, Los Angeles Herald Examiner.

We also have had many contacts in academic communities asking for information, or for us to provide data for numerous articles and things like that. In addition, we—we are contacted many times by people who have opposing view points on the initiative process, but our

reputation has come to be such that we provide information on either side.

(p. 64) Q Okay, Mrs. Thomas, would you please examine Defendants' Exhibit D, and I would like to ask you to identify what that exhibit is. The clerk will have it for you.

A Yes.

Q Would you identify that exhibit, please?

A Yes, this is a list of contacts that we have had at NCIR, since January through—I think I did it on the 18th of June, 1984, which basically breaks down into separate categories the type of request for information that we have received. Oh, I'm sorry, there is—it also includes 1983.

Q Have these contacts been with you personally?

A Yes, I would say probably 99 percent of them are with me personally.

Q And does the list include both phone contacts and mail contacts?

A Absolutely.

Q Has the Center sponsored any educational seminars or programs related to the initiative process?

A Yes, we have.

Mr. Danks: Your Honor, excuse me, counsel now has asked a couple of questions about Exhibit D and has gone on to another line without offering the exhibit.

The Court: That's not a violation of the rules, Mr. Danks.

Mr. Danks: Well, I submit, Your Honor, that it is.

(p. 65) The Court: I said it is not. So, it is not. You may continue.

Q Proceed.

A I'm sorry—

Q Yes, my question was has the Center been involved in any way or sponsored or have been involved in any educational programs or seminars related to the initiative process?

A Yes, we have funded two national seminars on the initiative process. The first was in November of 1981. That was held here in Denver. The second one was in January of '83, in Washington, D.C., and these drew from —from people nationwide who have some interest in the initiative process, people who would speak with some authority on an aspect of the initiative process, and participant level was between 85 to 100, 125 people, in each seminar.

Q Were you personally participating?

A I was not a panel participant. However, I was very active in reaching speakers, identifying possible speakers, identifying programs, and fitting their program into the overall program.

Q Are there any other centers other than the National Center for Initiative Review that track initiative petitions to the same extent your center does?

A Not that we've been able to identify. There are groups, at least two groups in Washington, who also publish newsletters that deal with the initiative process, but

their interest is that—(p. 66) is entirely different from ours. Where we are interested specifically in the mechanism of it, they are interested in issues. So we do not take stands on issues. We study the process itself.

Q Have you personally written any articles that have been published relating to the initiative process?

A Yes, I have, in 1982, I, along with David Mackelby and Walt Kline, did a paper that was presented at the American Political Science Association meeting here in Denver. I have—I do most of the writing of articles in our newsletter, which is published quarterly, and in addition to that, on a more formal basis, since January of this year, I have been doing a routine column in a magazine called "Legislative Policy." That is an initiative update, and the current issue also there is a feature story that I have written.

Q What is the title of the publication of National Center for Initiative Review?

A "Initiative Quarterly." We refer to it as "I.Q."

Q How often is that published?

A Usually quarterly, although we do from time to time, when activity and deadlines call for it, we publish an update, but it still goes under the title, "I.Q."

Q What is the primary focus of "Initiative Quarterly"?

A It has three main focuses. First, looks at some specific portion of the initiative process and describes it in detail. (p. 67) Second, it lists all current petition drives that are underway throughout the country and their status, and, thirdly, we include a section on legislative activity, whether that be in a chart form or in article form.

Q And you write most of the articles in that publication?

A I do.

Q Are there other staff members at the Center besides yourself at the present time?

A Well, I suppose it is unfair to say that I'm the only staff member of the NCIR, although I'm the only person that's on payroll 100 percent. I have support staff in the persons of an editor, who serves part-time for the newsletter, and financial accounting type person, who serves part-time to the Center in that capacity.

Ms. Gartland: Okay. Your Honor, I would like to move for admission of Defendants' Exhibit D.

* * *

(p. 68) The Court: What's the purpose of the offer?

Ms. Gartland: I'm attempting to qualify her as an expert in the field of initiative process. She is the Executive Director of this Center which specializes in studying the initiative process.

The Court: All right, for that limited purpose, it will be received. You may proceed.

(Defendants' Exhibit D received in evidence.)

Ms. Gartland: At this time I would like to ask the Court to designate Carolyn Sue Thomas as an expert in the initiative process.

* * *

(p. 69) The Court: If that's the basis of your objection, the objection is overruled. You may continue.

* * *

(p. 70) DIRECT EXAMINATION (Continued)

By Ms. Gartland:

Q Mrs. Thomas, would you provide us with a brief historical perspective about the initiative process in this country, when it came into being and for what purpose?

A Yes, the whole concept of direct democracy, in other words, citizen-generated activity, whether it be in the area of a generated law, or a popular referendum or recall, was one of the fundamental planks in the Progressive Party in the latter part of the nineteenth century, and certainly part of the twentieth century.

The first states that included this in their state Constitution was South Dakota in 1898 and Oregon in 1898. South Dakota, though, was the first to get an initiative on the ballot, and it is really considered the birthplace of the initiative process.

And the whole argument for this kind of activity was that state legislators at that time, particularly in the West —it is a western phenomenon—had been corrupted by outside interests and did not always address issues that were of concern to the citizens, and so by meeting special requirements citizens were allowed to propose their own laws and have them qualified for the ballot after these provisions had been satisfied.

Q How many states have adopted initiative laws?

A At this time, there are 23 states, plus the District of (p. 71) Columbia, that allow access to the state ballot by the petition process.

Q And did most of those states establish their initiative provisions in the early 1900s, or how were those laws established throughout the years?

A Yes, this was a pretty big move, in the West, during that early part of the twentieth century, and 19 of the

23 states—I'm sorry, 18 of the 23 states passed their initiative laws before 1918, and the states that have been added since then have put quite a few more restrictions on the process than the earlier states.

Q When was the process established in Colorado?

A 1908 was the year that it was adopted.

Q I would like to ask you to examine Defendants' Exhibit E. Would you identify this exhibit for the Court, please.

A Yes, this is a—this is a chart called an "Initiative Provisions by State," that was published by the National Center for Initiative Review as an insert of our newsletter in the third quarter, 1983.

Q Were you personally involved in the preparation of this chart?

A Yes, I was. I'm the one who pulled the facts together on it.

Q Generally, what—just very generally, without looking at specifics, what aspects of different states' initiative process (p. 72) is compared there?

A Well, as I mentioned earlier, when we started trying to find out as much as we could and learn as much as we could about the initiative process, one of the first things we realized was the diversity of provisions from one state to another, and there was just no one source available where you could quickly get an idea how the states compared on rigidity or elasticity of their initiative provisions, so over a period of I would say the first 18 months of our existence, we discovered several different categories that might be found in at least one state's initiative laws, and so over time I kind of started adding to that, to see if

we could come up with a one-page reference chart that could be used by anyone who—maybe someone who was even a neophyte in dealing with the petition process, and this chart was the result of that work.

Q Does this chart compare the requirements for getting a measure on the ballot in Colorado with the requirements in other states?

A Yes.

Ms. Gartland: Your Honor, at this time I would like to move for admission of Defendants' Exhibit E.

The Court: Mr. Danks?

Mr. Danks: May I voir dire, Your Honor.

The Court: You may.

• • •

(p. 75) (Defendants' Exhibit E received in evidence.)

DIRECT EXAMINATION (Continued)

By Ms. Gartland:

Q I would like to direct your attention to the column, "Signature Base Requirements." What information is shown in this column?

A First of all, there is—you are talking constitutional or statutory?

Q Constitutional amendments, I'm sorry.

A Under the State of Colorado, we show that the signature base requirement is five percent of the vote of the last vote cast for the office of Secretary of State, when that office is put on the ballot.

Q And how does that—the stringency of that requirement compare with the same requirement in the other states listed?

A Well, when we look at the constitutional amendment, there appear to be only two other states that have a lower signature requirement. However, what you have to consid r is that lower percentage is based on a different election figure. So, if you look at Massachusetts, where under a constitutional amendment there is a requirement of three percent, it is three percent of the total number of votes cast for the office of Governor, which might be a higher base than that for the office of Secretary of State.

Q And the only other state that might have a less stringent (p. 76) requirement?

A North Dakota.

Q Which is four percent of population.

A Right.

Q Which again could be a higher figure than five percent of the vote for Secretary of State?

A Could be, yes.

Q All other states have a stricter signature base requirement than the State of Colorado?

A For constitutional amendment.

Q I note there are some states that—there are less than 23 showing signature base requirement. Are there some states that do not have signature base requirement, some of the 23?

A Well, I think that may be where there is question—when we say 23 states, at the National Center for Initiative Review, we are looking at states which allow access to the ballot, either through a statute or initiative, or referendum. Some allow one or the other or both, but—

Q So we have actually only—it appears to be—17 that allow access to the ballot of an initiated amendment, constitutional amendment?

A Right.

Q Would you—moving along to—under "Constitutional Amendment" to the heading "Geographic Distribution Requirements," what is a geographic distribution requirement?

(p. 77) A Well, some states have placed a further restriction on signature gathering, by saying that not only do you have to have the base figure that we are talking about, in our case the five percent, but that these signatures have to be distributed somehow geographically, somehow throughout the state, to show that it is not a regional interest issue. This is—this is something that is happening in about—I would say about half the initiative states. We do not have that requirement in Colorado.

Q Moving along to the column "Filing Deadline," as soon as—well, is that the date prior to the election that the petition must be filed, with the Secretary of State's office?

A That's correct.

Q How does—what is the shortest period of time prior to the election within which the petition may be filed?

A Well, there is—one area that I should clarify here, and we are talking basically in this column—you will notice the one immediately preceding it has something to do with the information in this column, and we are talking about whether a state has a direct initiative or an indirect initiative. In other words, does it have to be submitted to the state legislature before it is submitted to the ballot, which is indirect, or does it go directly to the ballot upon satisfaction of the requirements. Colorado is a direct initiative state and it seems to be just about in line with other states that employ (p. 78) direct initiative. It is very common for those filing deadlines to fall within 90 to 120 days before the general election, unless the state has some cap on circulation time.

Q Thank you. If we skip the column headed "Statutes" and move over to the last category of information, under the column headed "Signature Certification Method Used," would you explain the legend showing the different types of signature certification methods that are used by the states?

A Most initiative states have some formal process, and included in your laws, that mandate the signatures on a petition be checked back against the voter registration lists to determine that the signatures are vaiid ones, and basically there are three types of mtehods that are used. On this chart they are keyed, I, which means that the signatures are checked individually against the registration list. The RS means that the state has employed some

random sampling technique, that if a certain content level is met on the random sample, then the measure is qualified. If there is a question about the number of valid signatures, as a result of the sample, then they go into the individual certification of signatures.

You will notice under Colorado that it is keyed PV, which means that we operate under the presumed validity principle, and that means that signatures are—must be accepted by the Secretary of State as valid, if all of the proper affidavits have been signed by the circulators.

(p. 79) Q So there is no checking or verification of signatures?

A Not to my knowledge. Unless there is a challenge, either by opposition—the first time through, they are accepted as valid.

Q So the Colorado method you would say is the most lenient of all the methods employed?

A Yes, in my opinion, that's correct.

Q The last—

Mr. Danks: Your Honor, I'm going to move to strike all this testimony on grounds of relevancy. If the Attorney General is attempting to show that there is a compelling state interest in deterring initiatives from being placed on the ballot that would be the only possible relevancy. They have attempted to show, I assume, by this line of questioning that certain states impose a geographical requirement and certain states have a higher percentage of voters in order to get on the ballot, and Colorado does not have these requirements, therefore, it imposes the

burden of requiring only volunteer petition circulators, and that somehow compensates.

Since we impose the burden of not allowing paid circulators, then we correspondingly don't have some of the other requirements. I submit if the Attorney General wants to make that as an argument, then that should be set forth, but that's the only possible relevancy.

In other words, are they asserting there is a compelling (p. 80) state interest in deterring it being on the ballot?

The Court: I think that's the object of the lesson. If that's a motion, it's denied.

Mr. Danks: It was a motion, Your Honor.

The Court: Very well, denied.

Q Mrs. Thomas, the chart also contains some columns in the far right side of the document, headed "Your Initiative Process," and "Number of Initiatives on Ballot up to 1969." I would like to direct your attention to those particular columns.

A Okay.

Q First heading there is "Your Initiative Process Adopted," the second "Number of Issues on the Ballot up to 1969." How does Colorado fare when compared with other states on number of issues on the ballot historically up to the year 1969?

A Until 1969?

Q Yes.

A I would say that it is right up there. You can look at the chart and see by the number of measures that

qualified for the ballot that Colorado is in the company of such heavy initiative states as California, Arizona, Oregon and North Dakota.

Q And am I correct that the only states that surpass Colorado in number of initiatives on the ballot were California, Oregon—and Washington? Or, wait a minute—

A For 1969?

Q Or up to 1969.

(p. 81) A Were Arizona, California, North Dakota and Oregon, all had more than we did.

Q All right, for the time period 1970 to 1979, where does Colorado fall in the ranking of states, according to number of initiatives on the ballot?

A Well, just about in the same place. Just—it would appear that Colorado ranks second in the number of initiatives that appear on the ballot during that time. California had 22. We had 18. Michigan 14, Oregon 17, Washington 14, so right up with the states that are considered to be traditionally heavy initiative states.

Q And then for the last time period, 1980 to 1982, the chart shows Colorado had 128 measures on the ballot. It was surpassed only by California, Oregon—

A You are looking at the total number.

Q I'm sorry, seven measures on the ballot, which was surpassed by California, Montana, and equalled by Michigan, am I correct?

A Equalled by Oregon—by Michigan.

Q It was again in the top four?

A Yes.

Q Has the use of the initiative process nationwide varied from the time of the start in the early 1900s to the present?

A Yes, so far the high-water mark for initiative activity was 1914, when there were 86 initiatives that appeared on statewide ballots, and then we went through until maybe the '40s (p. 82) or '50s sort of a decline of activity, but that started building up again in the early '70s, and since the early '70s has had a steady increase with each election cycle, not only in the number of measures that made it to the ballot, but in the number of proposals that are submitted to be accepted for circulation.

Q Okay, have you personally done any research on the percentage of persons—excuse me, percentage of petitions circulated which have reached the ballot in any given year?

A Yes, tables that included this kind of information were part of the paper that we did—that I did with Mackelby and Kline for the American Political Science Association in 1982. Historically, approximately one out of four issues that started an initiative process can actually qualify, meet the requirements for ballot placement.

Q And for what time period?

A From about '78 to '82.

Q And that was a nationwide study?

A On the initiative, yes.

Q So, if the record in this case shows that Colorado's average was higher than 25 percent, it would be higher than the national average?

A Yes.

Q Mrs. Thomas, would you explain what is meant by the term "Initiative Industry"?

A The initiative industry is a group of businesses that seem (p. 83) to have gotten their start by being able to capitalize on provisions in a state, by gaining access. Leadership in the initiative industry today is the State of California, where they have some sort of unusual provisions that allow for the collecting of signatures by mail. The initiative industry, that is kind of an umbrella name, that would include firms that specialize in drafting initiative proposals and handling any legal challenges that might be made during the titling process, firms that specialize in collecting clean signatures, or unclean signatures. I imagine they are more worth their money if they collect clean signatures. Firms then that also can be consultants in fund raising, media campaign, overall campaign management.

Q Is this a fairly recent phenomenon, or have these industries been around for several years?

A Well, I think as far as the campaign management aspect of the initiative industry, it's been around quite awhile. That's not anything that's new. What's new is the tendency in many states to have signature specialization firms, and these firms can operate from paying 25 cents to a signature, for each signature they collect, which I think is probably the most common type to, you know,

pay on a per signature basis for someone collecting in a shopping center or something like that, and go to the other extreme of what we find in California, many times on the direct mail signature campaigns, where firms might collect up to $1.50 for each signature that's returned in a direct mail (p. 84) campaign.

Q So the firm is hired by the proponent of the initiative?

A That's correct.

Q And then the firm takes charge of getting the necessary signatures?

A That's correct.

Q Do you have an opinion as to whether the use of a paid firm to gather signatures by the proponents of a measure has an effect on the manner in which those signatures are collected?

A Yes, there have been cases documented in some of the current literature, and especially some of Mackelby's work, that shows some of the possible abuses of—in signature collection phases, where especially if collectors are paid on a per signature basis, that they are more interested in volume than in quality, and so they might brush aside a question from someone who wants to know about what the initiative proposal would do. They might just hand them a brochure and send them on the side, so they wouldn't obstruct the path to the petition.

I have done some talking with state officials when I track initiatives. We have talked about their experience in verifying signatures and differences of validity rates

on campaigns where they have paid circulators and haven't had any paid circulators.

Q Do you know any specific state that has kept the exact statistics on validity rates when paid versus unpaid circulators (p. 85) are used?

A I can say I have in fact received information from the State of Ohio from the Director—

Mr. Danks: I'm going to object to this, public opinion polls, hearsay.

The Court: Sustained to hearsay.

Mr. Danks: Pardon me?

The Court: I said it is sustained on hearsay.

Q Do you have an opinion, Dr. Thomas, on the question of whether the use of paid petition circulators versus unpaid petition circulators affects the manner in which the merits of a proposal are discussed by the circulator?

A Yes, my opinion is that if someone is being paid on a per signature basis, that it is in their interest to collect large numbers of signatures, rather than taking time to explain what the proposal would do, and so the quality of total signatures would probably not be as high as if you had a dedicated volunteer who was really very interested in the proposal itself.

Q Are you aware of any published studies which compare the success rate of petition drives, using paid circulators, with those using unpaid circulators?

A Yes, the most recent complete list that I have seen was done in 1982, following the 1980 and '82 elections, by

David Schmidt, who was the editor of a newsletter called "The Initiative News Report," and he went through and categorized petition ballot (p. 86) measures by whether or not they had been paid or unpaid signature drives, and it was his conclusion that—

Mr. Danks: Objection, hearsay, Your Honor.

The Court: Overruled.

Q Go ahead, I'm sorry.

A That the volunteer drives enjoy a much higher success rate at the ballot box than the paid signature drives do.

Q Did he come to any conclusion on the extent to which the volunteer drives are more successful than the paid circulation drives?

A As I recall, it was about twice as often that they were successful at the ballot box.

Q Mrs. Thomas, will you examine Defendants' Exhibit F and identify that exhibit, please?

A Yes, this is an excerpt from The Initiative News Report that does contain the information that we were just discussing about 1980 and 1981, initiative and referendum.

Ms. Gartland: At this time I would like to move for admission of Defendants' Exhibit F.

Mr. Danks: Objection on the grounds of hearsay. I don't know which exception the Attorney General seeks to admit it under.

The Court: You are taking the position it is a recognized treatise?

Ms. Gartland: Yes, Your Honor.

(p. 87) The Court: Overruled. F is received.

(Defendants' Exhibit F received in evidence.)

Q Mrs. Thomas, does the Center devote time and activity to discussing potential abuses of the initiative and referendum process?

A Yes, we have selected information on that, just in the normal course of our work.

Q Would you give us your opinion as to the possible types of abuses that states need to be concerned about, if they wish to preserve this process as it was conceived historically as a popular grassroots efforts?

A Well, I think that the basic concern of those of us who study the process, and I would include in that the Center, as well as academics like Dr. Mackelby, is that the initiative process as it was initially envisonied, or as it was presented in the literature at the turn of the century, was that it was an instrument that was available to the common ordinary citizen to have, like a safety valve, within the state legislatures that did not address issues that were of concern to the general population, and it was strictly envisioned as a grassroots tool.

I think that what has happened over time, and as we start tracing the amounts of money that go into these kinds of campaigns, that it—it can no longer be classified as a grassroots process, if in fact it takes millions of dollars to get an issue like this to the public, and this is what we have (p. 88) seen.

You see it in paid petition drives. You see it in the amount of money that's poured into television and radio

campaigns, and so that our concern is that the initiative process has been perverted from its original intent, in fact become something available only to those groups that have the financial resources to set the political agenda through ballot qualifications.

Q Do you have an opinion as to whether paying circulators, as opposed to using volunteer circulators, is likely to add to the potential abuse of the process?

A Well, I think that in cases where—where you see that paid circulators have been used only for a portion of the signature drive, you know, as a supplement to volunteers, that probably the problems are minimal, but if you see it as a way of life, for ballot qualifications, if it becomes easier to qualify for the ballot through paid signature collectors than through a motivated grassroots effort, I think that does in fact signal a corruption of the process.

Ms. Gartland: Thank you. I have no further questions.

CROSS-EXAMINATION

By Mr. Danks:

Q Ma'am, I note from your resume that you received your degree in political science in May of 1981, is that right?

A That's correct.

(p. 89) Q And then you have worked for National Center for Initiative Review since you obtained your degree, is that right?

A That's correct. Well, actually, I finished course work in December, 1980, went to work for the Center in

February of '81, and the degree was conferred in May of '81.

Q So the National Center for Initiative Review was organized, am I correct, out of a concern that there may be too many initiatives being placed on the ballot in different parts of the United States?

A No, I don't believe out of a concern that there were too many, but out of the concern that people didn't understand how measures qualified for the ballot, from one state to another, how it differed.

Q Was there a concern that perhaps measures were being placed on the ballot and people were voting in pieces of legislation that were not prudent, at least in the institute's—light—

A Mind? Well, I think the concern was that looking at some of the initiative activity that had happened in states, particularly like California, that where initiative proposals did not fare well under judicial review, and many were in part or in whole declared unconstitutional, that there was then a national curiosity as to how did these get on the ballot, if they are going to be declared unconstitutional, and so that sort of generated the whole project of trying to study the history of the use of the process, for one state to another, to see if they had experiences similar to (p. 90) California.

Q The initiative is a form of direct democracy?

A That's correct.

Q People vote directly on a piece of legislation?

A Well, there are some exceptions to that. In the indirect initiative states, sometimes the initiative proposal

can be declared moot if adopted by the legislature before it goes to the ballot.

Q Is it your view that too many initiatives, or too much democracy in that sense, is a bad thing?

A Is it my view?

Q Yes.

A No, but I do think that sometimes there are issues that come up on the initiative process where you vote a simple yes or no that are highly complex, and that might be a little bit beyond the background of the voter to make a wise decision. This has been supported by polling done by Merfeld in California and by the Eagleton poll in New Jersey, and by newspaper polls in Boston and Florida, that show that oftentimes people feel that issues that make it to the ballot are far too complex, and their legislators would be better qualified to make a decision.

The Court: Excuse me, Mr. Danks. Thank you, go ahead.

Q Are you saying that there are certain matters that are just essentially too complicated for the voter to understand and vote on, and therefore they shouldn't be allowed to vote, and those (p. 91) matters should go to the legislature?

A No, we have never said that people shouldn't be allowed to vote on anything. In fact, we don't take a stand on the issue at all. I'm just telling you there has been studies done to examine how people feel about the initiative process, and those tend to support the general belief that even though people in large numbers, about 75 per-

cent of the people, when you ask them, "Do you think the initiative process is a valuable tool," they will say yes. When you say, "Do you think that legislators are better equipped to make decisions on complex issues," they will say in about 75 percent of the time yes.

So the question has become how—is the initiative process used best to handle complex problems. Those are things that no one knows. There has not been enough empirical data available to judge the complexity of the issue, and where the break point seems to be.

Q But you are saying that there are certain issues that are just too complex for the voters to vote on?

A I'm telling you that that is what the voters have said in polling that has been done before. The voters have said that there are some issues that are too complex for them to vote on.

Q Is that your personal opinion as well?

A When I look at some—

Q If it is possible to answer that yes or no, I would appreciate it. Is it your personal opinion that there are certain issues (p. 92) that are just too complex for the voters to vote on?

A My own opinion?

Q Yes.

A Yes.

Q And, as a matter of fact, of your own personal opinion, do you feel that the initiative process ought to be curtailed or restricted or perhaps even eliminated here in the State of Colorado?

A Are you going to give me a choice, or do I have to answer yes or no to restricted, curtailed or eliminated?

Q Let me ask it this way. Have you read the constitutional provisions in the State of Colorado on initiatives?

A Yes, I have.

Q Do feel that grants the people too great a right to put matters on the ballot?

A I think there are provisions that are considerably more lenient than other states.

Q So, is the answer to that yes, you believe our constitutional provision is too liberal, so to speak?

A Yes.

Ms. Gartland: I object. I think counsel is leading the witness as to what's in the Constitution and whether—I'm not clear on whether you are referring to all provisions in the statute, in the election code, that relate to the initiative process, or just to the constitutional grant itself.

(p. 93) The Court: Well, I think the witness is entitled to interpret the question in such a way that she can answer it, and she has obviously done so and answered it. You can bring that out on redirect, if you like.

Q Does your feelings on this initiative, the value of the initiative, color your testimony regarding whether or not you feel that paid petition circulators are more likely to forge or misrepresent—make misrepresentations in the collection of signatures?

A Did my personal opinion?

Q Yes.

A Become reflected in that?

Q Yes.

A No, I think that—what I have stated today is based on what I have learned in my professional experience, and I try not to let my personal opinions color that.

Q It does make it more difficult to get, or it could make it more difficult to get a petition on the ballot by prohibiting paid petition circulators, isn't that true?

A I don't think that the history of the Colorado initiative supports that viewpoint.

Q What is your opinion? Does it make it more difficult?

A I don't believe so.

Ms. Gartland: Your Honor—

The Court: Well, the question is answered.

(p. 94) Q All right, philosophically, the National Center for Initiative Review is oriented towards discouraging initiatives, is that correct?

A That's incorrect.

Q Now, your counsel has provided me a copy of a document called "Editorial Research Reports, Initiatives and Referendums," October 22, 1982. Have you seen that publication?

A Yes, I have.

Q And on Page 787, it states as follows, "Critics always say that ballot measure campaigns tend to be over-

simplified and heavy on the use of slogans that may be misleading. Quote, it's what someone referred to as a bumper sticker language, said Sue Thomas of the National Center for Initiative Review in Englewood, Colorado."

Now, assuming that I have accurately quoted that, is it correct that at least this publication perceives your institute and apparently perceives you as a critic of initiatives?

A We are a critic of lenient—we are a critic of campaigns that are fought that do not totally reflect the content of the initiative proposal, and there are aspects of the initiative process where we see there could be improvements made that would strengthen the process.

Q Now, you mentioned in your direct testimony that there are certain organizations or companies coming into existence which are more or less in the business of gathering petition signatures, (p. 95) isn't that right?

A That's correct.

Q Now, does your experience also include campaigns for political office by individuals?

A We are not involved in political campaigns, in candidate races, at all.

Q Are you aware of any campaign consulting firms that have worked for different candidates in different election years on a paid basis?

A Yes.

Q Now, as a matter of your own personal opinion, do you feel that those paid consultants in, say, the presidential campaign, ought to be disallowed?

A I don't see any correlation between candidate campaigns and issue campaigns. I—on the paid circulator portion of the issue campaigns, we are talking about an issue before it really is an issue.

Q Do you—

A Is that not correct?

Q Do you have any objection to the payment of an advertisement in a newspaper, for example, the Rocky Mountain News, and say the advertisement would say, "Please sign the petition to deregulate motor carriers"? Do you feel that is somehow a bad influence?

A No, absolutely not. I think that's a fantastic idea.

(p. 96) Q But you do believe that it is wrong to pay the petition circulator to go out and in effect say the same thing, is that right?

A Since we do have a requirement in the State of Colorado that the circulator face the signer face to face, then I do not see that it is the same thing at all. I mean the petitioner signer has to actually stand and watch someone sign the petition. I think that—I think that that's where I diverge from—I don't think it's a good idea to pay them to do that, but I think that putting ads in the paper, the carrying of banners, fly airplanes overhead, I don't see that as anything nearly the same as what you are talking about, paying someone to collect signatures.

Q Do you think there is anything ethically or morally wrong with paying someone for their work?

A No, I don't. I don't believe that there is anything wrong with that. Unless they are operating as a volun-

No. 87-920

In The

Supreme Court of the United States

October Term, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

v.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

BRIEF FOR APPELLANTS

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QUESTION PRESENTED

In the interest of assuring that only initiative measures with a significant modicum of support reach the ballot, may Colorado prohibit payment of petition circulators as long as it otherwise permits unlimited contributions and expenditures?

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—o—

BRIEF FOR APPELLANTS

—o—

OPINIONS BELOW

The *en banc* opinion of the Tenth Circuit Court of Appeals, is reported at 828 F.2d 1446 (10th Cir. 1987). The decisions of the district court and the Panel decision of Tenth Circuit are reported at 741 F.2d 1210 (10th Cir. 1984). The decisions are reprinted in the jurisdictional statement.

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JURISDICTION

The appellees (hereinafter referred to as the proponents) brought this action against appellants (hereinafter referred to as the "state" or "Colorado") pursuant

to 28 U.S.C. sec. 1331 (1980), charging that the prohibition against payment of initiative petition circulators contained in Colo. Rev. Stat. sec. 1-40-110 (1980) violated their rights under U.S. Const. amend. I. The federal district court sustained the constitutionality of section 1-40-110 on July 3, 1984. Its judgment was initially affirmed by a panel of the Tenth Circuit on July 31, 1984. The Tenth Circuit, sitting *en banc*, reversed on September 2, 1987. The state filed a Notice of Appeal regarding the *en banc* decision on October 6, 1987. An Amended Notice of Appeal was filed on October 23, 1987. This appeal was filed on November 23, 1987. Probable jurisdiction was noted on January 19, 1988. The Supreme Court has jurisdiction pursuant to 28 U.S.C. sec. 1254(2) (1966), which provides for an appeal to the Supreme Court when a federal court declares a state statute to be unconstitutional.

———o———

CONSTITUTIONAL PROVISIONS AND STATUTES

A. First Amendment, United States Constitution

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the government for a redress of grievances.

B. Fourteenth Amendment, United States Constitution

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the law.

C. Colo. Const. art. V, sec. 1(6)

To each of such petitions . . . shall be attached an affidavit of some registered elector that each signature thereon is the signature of the person whose name it purports to be and that, to the best of the knowledge and belief of the affiant, each of the persons signing the petition was, at the time of signing, a registered elector. Such petition so verified shall be prima facie evidence that the signatures thereon are genuine and true and that the persons signing the same are registered electors.

D. Colo. Rev. Stat. sec. 1-40-110 (1980)

Any person, corporation, or association of persons who directly or indirectly pays to or receives from or agrees to pay to or receive from any other person, corporation, or association of persons any money or other thing of value in consideration of or as an inducement to the circulation of an initiative or referendum petition or in consideration of or as an inducement to the signing of any such petition commits a class 5 felony and shall be punished as provided in section 18-1-105, C.R.S. (1973).

E. 1941 Colo. Sess. Laws 486, H.B. 947, sec. 8.

Provided further that it is not the intention of this act to limit or abridge in any manner the powers reserved to the people in the initiative and referendum, but rather to safeguard, protect and preserve inviolate for them these modern instrumentalities of democratic government.

———o———

STATEMENT OF THE CASE

Natalie Meyer, as Colorado Secretary of State, is charged with the administration and enforcement of the initiative and referendum laws. Colo. Rev. Stat. sec. 1-40-119 (1986 Supp.). Duane Woodard, as Attorney General, may institute criminal proceedings if a violation of the initiative and referendum laws has occurred. Colo. Rev. Stat. sec. 1-40-119 (1986 Supp.).

Colorado is one of 23 states to allow its citizens to place propositions on the ballot through the initiative process. (Joint Appendix, p. 100-101.) Colo. Const. art. V, sec. 1; Colo. Rev. Stat. secs. 1-40-101 to 119 (1980 & 1986 Supp.). Under Colorado law, proponents of an initiative measure must submit the measure to the State Legislative Council and the Legislative Drafting Office for review and comment. The draft is then submitted to a three member title board, which prepares a title, submission clause and summary. After approval of the title, submission clause and summary, the proponents of the measure then have 6 months to obtain the necessary signatures, which must be in an amount equal to at least 5 percent of the total number of voters who cast votes for all candidates for the Office of Secretary of State at the last preceding general election. If the signature requirements are met, the measure will appear on the ballot at the next general election. Colo. Rev. Stat. secs. 1-40-101 to 105 (1980 & 1986 Supp.); *Dye v. Baker*, 143 Colo. 458, 354 P.2d 498, 500 (1960).

The petition circulators must be registered electors. Colo. Const. art. V, sec. 1(6). They are required to sign an affidavit stating that each signature is the signature of

the person whose name it purports to be and that, to the best of their knowledge and belief, each person signing the petition is a registered elector. Colo. Rev. Stat. sec. 1-40-109 (1986 Supp.). Colo. Rev. Stat. sec. 1-40-110 (1980) prohibits payment of petition circulators. A violation of section 1-40-110 is a class 5 felony.

In 1984, the proponents submitted an initiative measure to deregulate the Colorado trucking industry. The proponents wanted to pay circulators and brought suit challenging the constitutionality of the prohibition against payment of petition circulators. They asked the trial court to declare unconstitutional section 1-40-110 on the ground that it violated their First Amendment right to political speech. They also asked the district court to enjoin enforcement of section 1-40-110.

The proponents argued that paying petition circulators would give them more free time and provide an incentive to get more signatures. One proponent testified that a circulator could take more time away from his job if he were paid. (Joint Appendix, pp. 19, 25.) Another testified that he would like to be able to pay circulators so that he could devote more time to his work. (Joint Appendix, p. 47.) A third proponent stated that paid petition circulators have more incentive to obtain signatures. (Joint Appendix, p. 39.)

The state argued that the prohibition allowed Colorado to maintain both the integrity and the grassroots character of the initiative process. The testimony indicated that the initiative and referendum process was implemented to negate the influence of monied special inter-

ests and to assure that the interests of the general populace would again assume supremacy. (Joint Appendix, p. 69.)

The state also showed that Colorado's signature requirement was more liberal than the signature requirements in at least 14 of the 17 states that allow a constitutional amendment to be adopted through the initiative process. (Joint Appendix, pp. 72-73.) Of the 23 states that have a statewide initiative process, Colorado ranked number 4, in the number of initiatives on the ballot in the years preceding 1969, ranked number 2 in the years between 1969 and 1979, and ranked in the top four in the years 1980 to 1982. (Joint Appendix, pp. 76-78, 103.) For the years 1978, 1980, and 1982, the percentage of petitions reaching the ballot was equal to or above the national average. (Joint Appendix, pp. 54-56.)

The trial court held that section 1-40-110 was constitutional. It concluded that the First Amendment rights of the proponents were not affected and that, even if First Amendment rights were implicated, the state had a compelling interest in maintaining the integrity and grassroots nature of the initiative process.

On appeal, a panel of the Tenth Circuit adopted the district court's opinion. Upon rehearing *en banc* the Tenth Circuit reversed the district court's decision, holding in a 6-2 decision that the prohibition unconstitutionally restricted the First Amendment rights of the proponents.

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SUMMARY OF THE ARGUMENT

Colorado's prohibition against payment of petition circulators does not violate the First Amendment. Colorado has the right to limit the initiative measures on the ballot to those measures which can show a significant modicum of support. The purpose of the initiative is to enhance control of democratic institutions by the general populace. The petition circulator is the only person who validates signatures. The prohibition affects only the act of paying someone who is performing a public function. It serves the compelling interest of protecting the integrity of the process by eliminating the incentive to pad petitions and by removing the appearance of corruption. It also serves the compelling interest of preserving the grassroots nature of the process by assuring that the number of circulators roughly reflects actual support for the initiative measure.

———o———

ARGUMENT

I. The Prohibition Against Payment of Petition Circulators Does Not Violate The First Amendment.

A. History of the Initiative

The initiative, as a tool of direct democracy, arose during the height of the Progressive movement, lasting from approximately 1898-1919. During this period distrust of big business, and particularly political organizations, was underscored by a firm belief that government should be in the hands of the people; that political bosses and machines should be overthrown; and that through re-

forms, democracy, liberty and rule of law would be achieved. *See* Magleby, David B., *Direct Legislation: Voting on Ballot Propositions in the United States*, Johns Hopkins University Press, 1984, pp. 21-22.

The movement toward direct democracy in the early part of the century was a western political phenomenon. South Dakota was the first state to adopt direct legislation in 1898; in 1902 Oregon became the first state to vote on an initiative measure. Twenty-two of the states that have direct legislation adopted it during the progressive era (1898-1919).

Colorado adopted the initiative and referendum in 1910. The history behind Colorado's adoption of the initiative and referendum tracks the history in other states. P. Starr, *The Initiative and Referendum in Colorado* 9-21 (August 11, 1958) (masters thesis) (reviewing history of Colorado's adoption of initiative procedure).[1] Under the Colorado system, the Legislature may pass laws which enhance the power of the initiative and referendum. *In re Interrogatories Propounded by Senate*, 189 Colo. 1, 536 P.2d 308, 315 (1975).

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[1]Governor Shafroth, a chief proponent, noted

> No matter what the cause may be it is clear from a survey of legislative history of the various states of the Union that legislatures, upon certain matters, do not represent the will of the people who elected them . . . the law of the Initiative and Referendum places the government nearer to the people, and that has always been the aim of the framers of all republican forms of government.

P. Starr, *The Initiative and Referendum in Colorado*, p. 11. (The thesis is available at the University of Colorado library.)

Colorado, like many other states, requires that the proponents of an issue must obtain a significant showing of support to obtain a place on the ballot. The petition requirement imposes a "dual intensity check." L. Sirico, *The Constitutionality of the Initiative and Referendum*, 65 Iowa L. Rev. 637, 661 (1980). The proponents must be willing to commit themselves to obtain the required signatures, and the voters must be so dissatisfied that they will sign the petitions. Underlying this process is the assumption that people will debate the issue in a manner similar to a town meeting. The petition process was envisioned as a conduit for the expression of voters' dissatisfaction.

As with many movements, the implementation of the ideal diverged from the ideal's goals. Over the years, the simplistic view of the educated enlightened voter espoused by the Progressive movement became subverted by the proliferation of special interest groups which have used the initiative process to accomplish legislation favorable to their causes. *See* Magleby, "Plebiscitary Democracy: The Initiative and Referendum in American Politics," *National Center for Initiative Review*, 27 Dec. 1983. Non-representative money interests came to dominate. Hofstadter, Richard, *The Age of Reform* p. 266 (Knopf 1974).

Like other states, Colorado experienced the distortion of the ideal. Some of the distortion emanated from the role of the paid petition circulator. The petition circulator was envisioned as a type of election judge. *See Sturdy v. Hall*, 143 S.W.2d 547, 550 (Ark. 1940). In Colorado, the role of the petition circulator is codified in the Colorado Constitution. Colo. Const. art. V, sec. 1(6). The petition

circulator must be a registered elector who must sign an affidavit that each signature on the petition is the signature of the person whose name it purports to be, and that to the best of his knowledge and belief, each of the persons signing the petition is a registered elector. Prior to 1941, Colorado had no law prohibiting payment to petition circulators. As a result, petition circulators were paid to obtain signatures. The payment of circulators was challenged as inherently fraudulent in the case of *Brownlow v. Wunsch*, 103 Colo. 120, 83 P.2d 775 (1938). The Colorado Supreme Court found that payment to petition circulators was not prohibited by either statute or constitution. However, it impliedly expressed reservations about the effects of such payment on the integrity of the process. It stated:

> To the extent that the fraud charged is premised on the advertisement for circulators and the latter being paid for names procured, without reference to our views as to the ethics of such procedure, it is sufficient to say that this practice is not prohibited by either the constitution or statutes.

Id. at 782.

Pursuant to its constitutional duty to secure the purity of elections and guard against abuse of the elective franchise, *see* Colo. Const. art. VII, sec. 11 and *Case v. Morrison*, 118 Colo. 517, 197 P.2d 621, 623 (1948), and its duty to enhance the initiative process, *In re Interrogatories Propounded by Senate, supra*, the Legislature, apparently in response to abuses of the sort chronicled in *Brownlow*, passed the prohibition against payment of circulators.[2] *See* H.B. 947, 1941 Colo. Sess. Laws 486. The Legislature stated the intent behind the 1941 reforms in section 8 of H.B. 947:

> Provided further that it is not the intention of this act to limit or abridge in any manner the powers reserved to the people in the initiative and referendum, but, rather to safeguard, protect and preserve inviolate for these modern instrumentalities of democratic government.

Id.

B. Payment of Circulators Is Not Protected by the First Amendment

The Tenth Circuit ruled that payment of petition circulators constitutes pure speech. Applying the strict scrutiny test, it concluded that the state did not have a compelling interest and that it did not impose the least restrictive means. The Tenth Circuit's analysis is flawed. The prohibition of payment regulates the conduct of a state function only. Payment of petitioner circulators is not a right which is protected by the First Amendment. Furthermore, even if the First Amendment values are im-

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[2]Several experts have commented on the distorting impact of paid petition circulators and have suggested that paid petition circulators should be either restricted or banned in order to preserve the spirit of the direct legislation process. A.D. Ertukel, "Debating Initiative Reform: A Summary of the Second Annual Symposium on Elections at the Center for the Study of Law and Politics," *Journal of Law and Politics*, 313, 318 (1984). *See also* Berg and Holman, "Losing the Initiative: The Impact of Rising Costs on the Initiative Process," *Western City*, pp. 27, 30, 44, June 1987.

plicated, the prohibition can withstand the application of any tests, including strict scrutiny.[3]

The Colorado constitution establishes the petition circulator as the person with the public duty to determine the validity of the signatures of the persons who sign the petitions. It is important to note that Colorado does not require any other signature validation by the state. The only persons who validate signatures are the petition circulators. The prohibition against paying petition circulators is significant because it removes the appearance of possible corruption from the only persons who validate the signatures. The position is obviously governmental in nature. The verification of signatures does not constitute speech, and the prohibition against payment of petition circulators constitutes nothing more than the prohibition against payment for the act of verifying signatures. The fact that a person voluntarily links his conduct with a speech component does not transform the conduct into speech. *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 n.7 (1984). If a person's First Amendment rights interfere with his public duties, then the First Amendment rights are not protected. *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980).

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[3]The Tenth Circuit ignored the history and concluded that this case is controlled by *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam), *Federal Election Commissioners v. National Conservative Political Action Committee*, 470 U.S. 480 (1985), *Citizens Against Rent Control/Coalition For Fair Housing v. City of Berkeley, California*, 454 U.S. 290 (1981) and *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). These cases are inapposite. Each of these cases addressed circumstances in which a law placed an absolute cap on total expenditures or prevented participation in the political process. None of these cases addressed a situation in which narrow limitations were placed on persons who were performing a quasi-public function.

C. Even If the First Amendment Provides Protection, the Prohibition Is Constitutional

Even if speech and conduct are intertwined, the prohibition is still constitutional. The First Amendment forbids the regulation of speech by the government in ways that favor some viewpoints or ideas at the expense of others. *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). A viewpoint-neutral regulation must be reviewed in accordance with the test set forth by the Court in *United States v. O'Brien*, 391 U.S. 367, 377 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

A restriction may be invalid if the remaining modes of communication are invalid. When speech and conduct are linked, First Amendment values must be balanced against competing societal interests. *Members of City Council v. Taxpayers for Vincent*, 466 U.S., at 805-07.

When analyzing the relationship between speech and conduct, consideration of the historical genesis of the initiative and the right of Colorado to control its electoral and political processes are crucial factors. Writing about the initiative, Justice White has noted:

> From its earliest days, it was designed to circumvent the undue influence of large corporate interests on governmental decisionmaking . . . . The role of the in-

> itiative . . . cannot be separated from its purpose in preventing the dominance of special interests. That is the very history and purpose of the initiative in California and similarly it is the purpose of ancillary regulations designed to protect it. Both serve to maximize the exchange of political discourse.

Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, 454 U.S. 290, 310-11 (1986) (White, J. dissenting).

The Court has recognized the sovereign authority of the states over their electoral and political processes which are not governed by the federal constitution and has generally granted substantial deference to the electoral methods selected by the state. *Rivera-Rodriguez v. Popular Democratic Party*, 457 U.S. 1, 8-9 (1982). If the state has authority to create a right, then the state also has the authority to place limitations on the scope of that right. *Posadas de Puerto Rico Associates v. Tourism Co.*, 106 S. Ct. 2968, 2979 (1986). The First Amendment does not authorize the Supreme Court to review the manner in which a state governs itself unless it significantly impairs First Amendment interests. *Clements v. Fashing*, 457 U.S. 957, 972-73 (1982).

The initiative is not a right which is conferred by the federal constitution. The people of the state of Colorado reserved to themselves the right of the initiative and referendum. The people delegated authority to the state legislature to establish procedures to assure the vitality of the initiative process. The legislature, pursuant to that authority, prohibited payment to petition circulators to enhance and protect the initiative process. The legislature, reacting to both potential and proven deficiencies, *see Munro v. Socialist Workers Party*, 107 S. Ct. 533, 538 (1986), properly enacted safeguards to preserve the initiative process. The Legislature intended to broaden political discourse, and its restriction was no greater than necessary to achieve its purpose.

Even if the Court ignores the conduct component, the speech component constitutes nothing more than speech by proxy. In *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981) (Marshall, J., plurality opinion), the Court determined that money contributed to others, who are independent of the contributor, constitutes speech by proxy. *Id.* at 196-197. Restrictions on such contributions are exceptionally minimal when the amount of money that may be spent is otherwise unlimited *Id.* at 195. Under these circumstances, speech is not entitled to full First Amendment protection, and the state must show only a rational basis. *Id.* at 197. The analysis in *California Medical Association*, controls the case at bar. The uncontradicted testimony was that the proponents wished to hire persons to speak on their behalf and to induce their surrogates to enthusiastically advocate their positions to the public.[4]

Even if the Court concludes that this is a "pure speech" case, the prohibition is still constitutional. In

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[4]Contrary to the facts in *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 495 (1985), this case does not involve many small contributors who want to add their voices to the message. It is essentially an attempt to substitute one voice for another.

a petition circulator case involving candidate ballot access, the Seventh Circuit held that the test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), is the appropriate test. *Citizens for John Moore v. Board of Election Commissioners*, 794 F.2d 1254, 1260 (7th Cir. 1986). In *Anderson v. Celebrezze, supra*, 460 U.S. at 789, the Court established a functional test:

> Constitutional challenges to specific provisions of a State's election laws therefore cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions. (Citation omitted) Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justification for the burden imposed by the rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of these interests, it must also consider the extent to which those interests make it necessary to burden the plaintiff's rights. . . . The results of this evaluation will not be automatic; as we have recognized, there is "no substitute for the hard judgments that must be made." (Citations omitted).

The prohibition has, at worst, a *de minimus* impact on First Amendment rights. It does not prevent the proponents from speaking out on behalf of the issues or requesting others to speak on their behalf. Other than the prohibition, the amount of money and the areas in which money may be spent are unlimited. *Clements v. Fashing*, 457 U.S. 957, 972 (1982).

The state's interests are compelling. The state must insure that the initiative measure has a significant modi-

cum of support and that the signatures on the petition reflect actual support rather than the influence of a few, powerful special interests. The history of the direct legislation movement, both in Colorado and nationally, shows a strong interest in removing the undue influence of wealth from the process. Recently, the Court reaffirmed the legitimacy of restrictions on corporate contributions on the ground that the potential for unfair deployment of wealth for political purposes "may make a corporation a formidable political presence, even though the power of the corporation may be no reflection of the power of its ideas." *Federal Election Commission v. Massachusetts Citizens for Life*, 107 S.Ct. 616, 628 (1986).

The same rationale underlies the prohibition. Historically, proponents intended to flood the political market with paid petition circulators to gain signatures. The number of petition circulators would not reflect grassroots support for placing the issue on the ballot; it would reflect only the availability of resources of those persons who can afford to pay petition circulators.[5]

The interest in requiring a significant modicum of support is the avoidance of confusion, deception and frustration of the democratic process. *Munro v. Socialist Workers Party*, 107 S. Ct. 533, 537 (1986); *Jenness v. Fortson*, 403 U.S. 431, 442 (1974). Although Colorado has a signature requirement, the use of money to hire petition circulators could skew the initiative process. By prohibiting payment of petition circulators, Colorado insures that the number of petition circulators roughly reflects actual sup-

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[5]See footnote 2.

port for the proposal. If there are few people who are sufficiently committed to circulate petitions, then the issue does not have enough underlying support and should not be placed on the ballot.

The state also has a compelling interest in protecting the integrity of the initiative process. Prohibiting payment to those persons who are solely responsible for the verification of signatures on the petition avoids the appearance of corruption. The avoidance of the appearance of impropriety is central to maintain integrity and confidence in the initiative process. *Buckley v. Valeo*, 424 U.S. 1, 27 (1976).

The Tenth Circuit concluded that the imposition of criminal penalties was the least restrictive method. This Court has already disposed of this argument. In *Buckley v. Valeo*, 424 U.S. at 27-28, the Court stated:

> Appellants contend that the contribution limitation must be invalidated because bribery laws and narrowly drawn disclosure requirements constitute a less restrictive means of dealing with "proven and respected quid pro quo arrangements." But laws making criminal the giving and taking of bribes deal only with the most blatant and specific attempts of those with money to influence governmental actions. And while disclosure requirements serve the many salutary purposes discussed elsewhere in the opinion, Congress was surely entitled to conclude that disclosure was only a partial measure and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions. . . .

The state has employed the least restrictive means. As noted earlier, the amount of money which proponents

can expend is unlimited. The statute in no way prohibits interested citizens from spending unlimited amounts of money or from associating at will to express their views. The proponents can buy time on television or radio. They can purchase advertising space in newspapers. They can hire unlimited numbers of persons as advocates to canvas neighborhoods or to speak at functions. They can distribute leaflets. They can approach citizens and ask them if they are registered voters. They can even direct them to the petition circulators.

The evidence in this case shows that the prohibition does not impede access to the ballot or the likelihood of success when proposed measures reach the ballot. Of the 23 states that had a statewide initiative process at the time that the case was tried, Colorado ranked No. 4 in the number of initiatives on the ballot in the years preceding 1969, No. 2 in the years between 1969 and 1979 and in the top four in the years 1980 to 1982. The evidence also establishes that for the years 1978, 1980 and 1982, the percentage of petitions reaching the ballot was equal to or above the national average. Colorado's signature requirement is less stringent than the signature requirements in at least 14 of the 17 states that allow adoption of a constitutional amendment to be adopted through the initiative process.

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CONCLUSION

The purpose of the prohibition against payment of petition circulators is to protect the integrity of the initiative process and to insure that only measures which achieve significant grassroots support reach the ballot. Without the prohibition, unrepresentative but influential interests could place matters on the ballot which do not reflect popular support. The state can regulate the initiative ballot to assure that only matters with a significant modicum of support are placed before the voters at an election.

Respectfully submitted,

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NATALIE MEYER, in her official capacity as Colorado Secretary of State, and
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Appellees.

—o—

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

BRIEF OF APPELLEES

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QUESTION PRESENTED

Does that portion of Colo. Rev. Stat. Sec. 1-40-110, which prohibits payment to circulators of petitions violate the Appellees' rights to freedom of speech and political association guaranteed to them by the First and Fourteenth Amendments to the Constitution of the United States?

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The Plaintiffs-Appellees, Paul K. Grant, et al., submit this Brief.

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STATEMENT OF THE CASE

The Appellees were proponents of a proposed initiative to amend the Constitution of the State of Colorado to eliminate the authority of the Public Utilities Commission to regulate motor carriers.[1] The Appellees needed at least 46,737 signatures of registered voters before August 6, 1984 in order for the initiative to be placed on the November 1984 ballot (J.A. 14).

Because of difficulty in obtaining the required number of signatures, the Appellees wanted to be able to hire petition circulators. However, a Colorado statute made it a felony offense to pay someone to circulate a petition (C.R.S., § 1-40-110). The appellees, therefore, brought suit challenging the constitutionality of the statute.

The evidentiary record in this case is short. The entire transcript of the testimony appears in the Joint Appendix at pages 11 through 97. In addition, the trial court admitted six exhibits into evidence and admitted two other exhibits for limited purposes.[2,3]

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1. The petition (Plaintffs' Ex. 1) appears at App. 74-9 of the Jurisdictional Statement.
2. Defendants' Exhibit G was adm...ed solely for the quotation from Mrs. Thomas. The quote appears in the transcript at JA96.
3. In the Brief for Appellants, the State cites seven articles in support of various "facts." These articles are listed on

(Continued on following page)

At trial, Mr. Grant and Ms. Massie testified that approaching strangers to obtain signatures is difficult and discouraging work (J.A. 37). They further testified that the most effective method of communicating with potential signors of the petitions was through the person who was carrying the petition (J.A. 41). Finally, they testified that the prohibition against paid petition circulators restricted the number of registered voters whom they could reach with their message (J.A. 19).

Mr. Grant gave the following testimony based upon his experience as a petition circulator:

> [T]he way that we go about soliciting signatures is that you ask the person—first of all, you interrupt the person in their walk or whatever they are doing. You intrude upon them, "Are you a registered voter?"
>
> Many people say, "I haven't got time, don't bother me," or "Yes, I am, but it is none of your business," or "Yes, I am, so what?"
>
> If you get a yes, then you tell the purpose your purpose, that you are circulating a petition to qualify the issue on the ballot in November, and tell them what about, and they say, "Please let me know a little bit more." Typically, that takes maybe a minute or two, the process of explaining to the persons that you are trying to put the initiative on the ballot to exempt Colorado transportation from PUC regulations.

(Continued from previous page)

page V of the State's brief as "Other Authorities." None of these articles were admitted into evidence.

The appellees object to the introduction of this evidence into the record. The State has not requested this Court to take judicial notice of "adjudicative facts" pursuant to FRE 201. Furthermore, the State's brief contains few "legislative facts" pertaining to *Colorado* constitutional or legislative history.

> Then you ask the person if they will sign your petition. If they hesitate, you try to come up with additional arguments to get them to sign. If they don't, you say, "Thanks, have a nice day." (J.A. 15-16)

According to Appellants' Exhibit E, twenty-four states have some form of initiative process. Of these, only Colorado, Nebraska and Washington prohibit paid circulators. The remainder of the states, (21), allow paid petition circulators.

—o—

SUMMARY OF ARGUMENT

The appellees wished to convince registered voters to sign their petition. The most effective way to reach and convince someone to sign the petition was through the petition circulator. By prohibiting the appellees from hiring petition circulators, the State of Colorado effectively limited the number of people which the appellees could reach with their message to sign the petition.

The issue in the case is not whether the initiative is a good or bad procedure. The issue is whether the appellee's First Amendment rights to free speech and political association have been violated.

The State of Colorado has advanced no governmental interest which justifies this restriction on the appellees' right of free speech and political association. The Tenth Circuit Court of Appeals, therefore, correctly held that the Colorado Statute is unconstitutional.

—o—

ARGUMENT

The Prohibition Against Paid Petition Circulators Limits The Quantity Of Speech

The statutory prohibition against payment to circulators of petitions limits the number of registered voters who can be reached with the message to sign the petition. The statute thus imposes restrictions on the First Amendment guarantee of freedom of speech and political association.

"The protection given speech and press was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957):

> Whatever differences may exist about interpretation of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and form of government, the manner in which government is operated or should be operated, and all such matters relating to political processes.

Brown v. Hartlage, 456 U.S. 45, 52-53 (1982). (*quoting Mills v. Alabama*, 384 U.S. 214, 218-219 (1966)).

The proponents of an initiative may spend unlimited amounts on general newspaper, television or radio advertisements urging registered voters to sign a petition. However, the most effective form of communication is the personal contact by the petition circulator. As he approaches the registered voter, he explains his purpose, the merits of the initiative and the need to sign the petition. The number of voters who can be reached in this manner is limited because the proponents of the initiative cannot pay people to directly communicate the message.

This case concerns a limitation upon campaign expenditures in support of ballot issues. The United States Supreme Court has previously declared that limitations on expenditures in any type of election (candidate or ballot) violate the First Amendment right to free speech and political association. *Buckley v. Valeo*, 424 U.S. 1 (1976). *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978). *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981). Concerning ballot measures, the United States Supreme Court has previously declared unconstitutional restrictions on contributions and expenditures. *First National Bank of Boston v. Bellotti, supra. Citizens Against Rent Control v. Berkeley, supra.* Only in a limited area of contributions to candidates has the United States Supreme Court sustained restrictions on campaign finances. *Federal Election Commission v. National Conservative Political Action Committee, et al.*, 470 U.S. 480 (1985).

Furthermore, three different Federal District Courts from other circuits have declared identical prohibitions on paid solicitors to be unconstitutional under the First Amendment. The pertinent decisions from other courts including the three U.S. District Court cases are:

State v. Conifer Enterprises, Inc., 82 Wash. 2d 94 508 P2d 149 (1973). Washington Supreme Court held that a Washington Statute prohibiting payment to petition circulators did not violate the First Amendment. *This case was decided before Buckley v. Valeo.*

Hardie v. Fong Eu, 556 P2d 301 (1976). California Supreme Court declared unconstitutional the limi-

tation on expenditures in connection with circulation of initiative petitions.

D.C. Committee on Legalized Gambling, et al. v. Carl S. Rauh, Civ. No. 79-3296 Dist. of Columbia, Dec. 21, 1979. (Unpublished opinion—copy attached to petition for rehearing before the Tenth Circuit.) United States District Court for the District of Columbia declared unconstitutional the prohibition on payment to circulators of initiative petitions.

Libertarian Party of Oregon v. Paulus, Civ. No. 82-521 F.R. (D. Ore., Sept. 3, 1982). (Unpublished opinion—copy attached to brief of appellant before the Tenth Circuit.) United States District Court for the District of Oregon declared unconstitutional the prohibition on payment to circulators of petitions.

Robin K. A. Ficker v. Montgomery County Board of Elections, et al., 670 F. Supp. 618 (D. Md. 1985). United States District Court for the District of Maryland declared unconstitutional the prohibition on payment to circulators of petitions.

The decisions of the United States Supreme Court and the case authority from other courts strongly support the en banc opinion of the Tenth Circuit.

The Petition Circulator Is Not A "Type Of Election Judge"

The State in its Brief argues that "(t)he petition circulator was envisioned as a type of election judge. See *Sturdy v. Hall,* 143 S.W. 2nd 547, 550 (Ark. 1940)." Brief of Appellant, p. 9.

This argument was not raised by the State before the trial court. Furthermore, the Arkansas case has no impact on Colorado law. There is nothing in the Colorado Constitution or Colorado Statutes which states that the petition circulator is a "type of election judge." The evidence in the record establishes that the petition circulator is an advocate who attempts to convince someone to sign the petition. The petition circulator is not a passive official who merely receives the signature. Finally, even if the petition circulator were an election judge, there is no evidence in the record that a "volunteer" petition circulator would be a better "type of election judge" than a paid petition circulator. A paid work force may be more reliable and dependable than a "volunteer" work force.

The right of initiative is reserved to the people in the Constitution of the State of Colorado. (Article V, para. 1, Constitution of Colorado). The Colorado Constitution does not prohibit payment to petition circulators. Futhermore, it states that "(t)his section of the Constitution shall be in all respects self-executing." Some thirty years later and in spite of the language in the Constitution that the initiative provision is self-executing, the legislature added by statute the requirement that petition circulators could not be paid. CRS 1-40-110.

The expressed purpose of the legislature, in enacting the statute was not to make it more difficult to obtain the required number of signatures and thereby decrease the number of initiatives which would be voted upon by the electorate. The expressed intent of the legislature was to "safeguard" the initiative process.

> "It is not the intention of section 1-40-101 to 1-40-111 to limit or abridge in any manner the powers reserved

to the people in the initiative and referendum, but rather to properly safeguard, protect, and preserve inviolate for them these modern instrumentalities of democratic government." C.R.S. § 1-40-111.

In their Constitution, the people of the State of Colorado granted to the general assembly the power to enact laws. However, the people *reserved* to themselves the right to enact laws and amend the Constitution directly through the initiative. Article V § 1 describes the power of the people to initiate laws as follows:

> "The legislative power of the state shall be vested in the general assembly . . . but the people reserve to themselves the power to propose laws and amendments to the constitution and to enact or reject the same at the polls independent of the general assembly."

The people, not the legislature, are the ultimate source of power under the Constitution of the State of Colorado. "All political power is vested in and derived from the people. . . ." (Article II §1, Constitution of Colorado). "The people of this State have the sole and exclusive right of governing themselves. . . ." (Article II § 2, Constitution of Colorado).

Thus, the right to initiate legislation and amendments is not a power which has been granted to the people. "(I)t is not a grant to the people but a reservation by them for themselves." *McKee v. City of Louisville*, 200 Colo. 525, 616 P2d 969, 972 (1980).

The provision in the Colorado Constitution providing for the initiative states that it shall be "self-executing".

> "This section of the constitution shall be in all respects self-executing; except that the form of the initiative or referendum petition may be prescribed pursuant to law." Article V §1 (10), Constitution of Colorado.

Since the Constitutional provision is "self-executing", the general assembly of Colorado may enact provisions regarding the initiative only "so long as it does not diminish their rights . . ." *In re Interrogatories Concerning H. B. 1078*, 189 Colo. 1, 8; 536 P2d 308, 314 (1975). Legislation which affects the initiative "must further the purpose of the right or facilitate its operation." *City of Glendale v. Buchanan* 195 Colo. 267, 272; 578 P2d 221, 224 (1978).

> "It is well established in this State that the Legislature may not impose restrictions which limit in any way the right of the people to initiate proposed laws and amendments except as those limitations are provided in the constitution itself. *Colorado Project—Common Cause v. Anderson*, 177 Colo. 402, 404; 495 P2d 218, 219 (1972).

Since C.R.S. 1-40-110 restricts Appellees' First Amendment rights, it may be upheld only if it passes "exacting scrutiny". "Especially where, as here, . . . the speech is intimately related to the process of governing . . ." *Bellotti* at 786. *See also Berkeley* at 294 ('regulation of First Amendment rights is always subject to exacting judicial review.")

"(T)he state may prevail only upon showing a subordinating interest which is compelling. . . and the burden is on the government to show the existence of such an interest." *Bellotti* at 786.

The petition circulator in Colorado is not "a type of election judge." He is an advocate who attempts to con-

vince someone to sign the petition. However, even if he were "a type of election judge," there is no evidence that the subject statute promotes that interest.

The State's Asserted Interest In Preventing "Padded" Petitions Does Not Justify This Statute

The state argues that the statute "serves the compelling interest of protecting the integrity of the process by eliminating the incentive to pad petitions and by removing the appearance of corruption." Brief for Appellants, p. 7.

It would be helpful if the State would say directly what it means. Does "pad(ed) petitions" mean petitions which contain forged signatures? Does "eliminating the incentive" mean that paid petition circulators are more likely to forge signatures than "volunteer" petition circulators? Before the trial court, the State specifically stated that the purpose of the Statute was not to prevent forged signatures.

However, assuming that the State now argues that prohibiting paid petition circulators promotes a governmental interest in eliminating forged signatures, the evidence does not support that conclusion. Furthermore, there is no evidence in the record (nor was it argued by the State in the trial court) that the public believes that signatures gathered by paid circulators will contain a high number of forged signatures.

The United States Supreme Court has held that the only State interests which justify restrictions on campaign finances are corruption or the appearance of corruption and this holding has been applied only in cases related to candidate elections.

> "We held in *Buckley* and reaffirmed in *Citizens Against Rent Control* that preventing corruption or the appearance of corruption are the only legitimate and compelling interests thus far identified for restricting campaign finances." *Federal Election Commission v. National Conservative Political Action Committee* 470 U.S. 480, 496-7 105 S.Ct. 1459, 1468 (1985).

However, as to campaign expenditures, the United States Supreme Court has bound no governmental interest sufficient to justify limitation on expenditures.

> "No governmental interest that been suggested is sufficient to justify the restriction on the quantity of political expression imposed by § 608 (c)'s campaign expenditure limitation." *Buckley v. Valeo*, 424 U.S. 1, 56; 96 S. Ct. 612, 652 (1976).

The State of Colorado has an interest in ensuring that the signatures on the petitions are valid. The State also has an interest in ensuring that someone does not sign the petition as the result of a false or misleading statement by the petition circulator.

However, does the prohibition against paid petition circulators further this State interest? Are paid petition circulators more likely than unpaid circulators to forge signatures or to make false or misleading statements? There is no evidence in the record to suggest this conclusion.

Witnesses for the Appellees testified that money motivates people to work. *See also Urevich v. Woodard*, 667 P.2d 760, 763 (Colo. 1983) ("We can take judicial notice of the fact that it is often more difficult to get people to work without compensation than it is to get them to work for pay."). Witnesses for the Appellees also testified

that soliciting signatures can be discouraging work. However, there is no evidence that money in and of itself is such a motivating factor that people are willing to violate the law in order to earn the money.

Indeed, the two witnesses for the State both testified that being paid would not cause them to violate a law.

Q Now, in exercising your duties, you are a law abiding citizen and you don't violate the law, is that correct?

A That is correct.

Q Now, does the fact that you are paid for your work, in any way cause you to violate the law?

A I know of no way, that being paid causes me to violate the law. (Testimony of B. Chronic J.A. 57)

* * *

Q Do you attempt in your everyday life to obey the laws?

A As much as possible.

Q Why do you obey the laws?

A Because they are there.

Q If someone paid you to violate the law, would you violate it?

A I can't think of anything that would make me do that. (Testimony of S. Thomas J.A. 92-3.)

Petition solicitors who "voluntarily" contribute their time to obtain signatures are also motivated to obtain signatures. Because the organization which is promoting the initiative has less control over "volunteers" as opposed to "paid" solicitors, the inference may be drawn

that "volunteers" are more likely to forge signatures or make false or misleading statements. In an analogous case, the United States Supreme Court stated:

> Note 13. "Indeed, solicitation by organizations employing paid solicitors carefully screened in advance may be even less of a threat to public safety than solicitations by organizations using volunteers." *Village of Schaumburg v. Citizens for a Better Environment, et al.*, 444 U.S. 620, 639, 100 S.Ct. 826, 837 (1980).

However, even if the statute does eliminate a temptation to pad petitions, the statute is constitutional only if there are not other more direct ways of dealing with the problem of "padded petitions". *Buckley v. Valeo* 424 U.S. at 45, 55-56. As stated previously, it is a felony offense in Colorado to forge a petition signature, (C.R.S., § 1-13-106). To make sure that the petition solicitor is aware of this offense, he must sign an affidavit with each petition specifically stating the genuineness of each signature, (C.R.S. § 1-40-106 (2)). By statute, in bold *red* ink on each petition must appear the following language:

> WARNING:
>
> IT IS AGAINST THE LAW:
>
> "For anyone to sign any initiative or referendum petition with any name other than his or her own or to knowingly sign his or her name more than once for the same measure or to knowingly sign such petition when not a registered elector." C.R.S., § 1-40-106 (1).

A statutory procedure exists for promptly challenging the validity of petition signatures, (C.R.S., § 1-40-109). Thus, even if the statute does eliminate the "incentive to pad petitions", the statute is nevertheless unconstitutional

because there are specific criminal offenses which directly attack the problem of "padded" petitions.

Allowing Paid Petition Circulators Would Have Assisted This "Grassroots" Initiative

The evidence at trial demonstrated that the plaintiffs-appellees were a "grassroots" movement to place an initiative on the ballot to deregulate motor carriers.[4]

The following excerpts from the testimony of Paul Grant and Lori Massie highlight the nature of the movement. Mr. Grant was the principal organizer of the effort. Ms. Massie was the fundraiser and petition coordinator.

Mr. Grant testified as follows:

"Q Mr. Grant, you are one of the plaintiffs engaged in this lawsuit, is that correct?

A Yes, I am.

Q In brief format, give us your background. Where did you go to college? What is your educational background and what is your occupation?

A I have two degrees in chemical engineering, a Bachelor's and a Master's, the Master's from the University of Maryland. Three years experience in the United States Army. My profession is working as a sales engi-

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4. Webster's New Collegiate Dictionary, First Printing 1973 defines "grassroots" as "society at the local level esp. in rural areas as distinguished from the centers of political leadership." The appellees do not contend that they are a "rural" movement but do contend that they are otherwise within the definition of "grassroots."

neer. I sell process equipment to chemical and mine companies. I have been in sales for the last eight years.

I have also been active in political activities. I am (p. 6) the National Chairman of the Libertarian Party at this time, as well as Chairman of the Coloradans for Free Enterprise, one of plaintiffs in this case.

Q What is Coloradans for Free Enterprise?

A Coloradans for Free Enterprise is a non-partisan group founded in 1982 as a for-profit corporation, and its purpose was to promote free market solutions to problems here in the State of Colorado. (J.A. 11-12)

* * *

(p. 7) Q You mentioned by background and profession you are a chemical engineer. Does that professional background relate specifically to this proposal?

A Not in any way. (J.A. 13)

* * *

Q Would you describe just generally and rather briefly the process that you went by in order to get this petition in the position that it is in now?

A Well, the first time we did it, before drafting the initiative, was look for a group of people to support it, broad-based group of citizens, and we wanted their input in the drafting, so we had something which was acceptable to a large group of people.

(p. 8) We had involved in that process transportation attorneys, members of the transportation industry, mem-

bers of Coloradans for Free Enterprise, and members of the Colorado Legislature. (J.A. 13-14)

* * *

Q You mentioned there was a broad base of supporters for this. Would you identify by name and political parties some of the principals.

A Well, the primary supporters of this initiative who are listed on our letterhead as endorsers, I will go through as best (p. 9) I can from memory. Nancy Bigbee, a transportation attorney. State Representative Frank D. Phillipo, a Republican from Jefferson County. State Senator Barbara Holme, a Democrat from Denver. State Senator Don McManus, Democrat from Adams County. State Representative Ruth Pendergast, Republican. State Representative Pete Menham from Colorado Springs. Bill Womack, a member of the RTD board. Bill Rourke, the Colorado Chapter of National Association of Independent Businesses. Patrick Lilly, Chairman of the Colorado Libertarian Party. Spencer Soame, head of Coloradans for Alternative Transit, and a few others on that letterhead whose names I don't recall.

Q In obtaining the petitions, could you describe what you have personally done. Have you actually gone out and asked people to sign a petition?

A In this case?

Q In this particular case.

A Yes, I have collected over 400 petition signatures as of today. (J.A. 14-15)

* * *

Q In a more serious vein, what have you tried to explain? (to convince someone to sign the petition).

A

* * *

We tried to convey the unfairness of the existing system, which has denied individuals the right to start their own businesses. In many cases, individuals have asked for an authority and been turned down because huge corporate organizations have opposed them.

* * *

(p. 12) And we, in conjunction, mention the fact that there have been repeated efforts to do similar work with deregulation through the Colorado Legislature, but those bills have been bottled up in committees, and heavy lobbying pressure, and lots of dollars have been spent in keeping those bills from reaching the floor. (J.A. 16-17)

* * *

Q All right, now, we are in court asking the Court to allow you to pay petition circulators. If this Court should grant our relief, what effect would that have on your petition drive?

A I think it would allow us to qualify our petition drive for the November ballot, if we were allowed to pay petitioners. (J.A. 19-20)

Ms. Massie gave the following testimony in pertinent part to illustrate that it was a "grassroots" effort and that paying petition circulators would assist that effort.

Q Are you involved in this effort to deregulate motor carriers in Colorado?

A Oh, yes, I am.

Q What involvement do you have?

A Well, I am in charge of the functioning of getting this thing on the ballot. Recruiting people for the ballot drive. I'm also responsible for raising money for the effort.

Q Are you being paid at all for your efforts?

A I get a percentage of what I raise.

Q As a practical matter, how much have you made?

A I was going to try to figure it. I think it comes to about a nickel an hour now. I have gotten $529 over three months, and part of that is because I feel it is more important to get it on the ballot than to raise money, because—getting on the ballot means our success with it. (J.A. 38-39)

* * *

Q If you had a thousand dollars to spend on this deregulation of motor carriers, and you wanted to get the most signatures in effect for your thousand dollars, would you run a thousand dollars worth of ads, say the Rocky Mountain News, or would you spend a thousand dollars on petition circulators?

A I would put every penny of it in petition circulators.

Q Why is that?

A Because it is a direct way of reaching people, rather than having an ad in a paper that asks people to support us, and then somehow expect those people to go

out and find our circulators, wherever they may be. This is a direct way of having a one-on-one confrontation with an individual who wants to get it on the ballot, and a potential signer. Much more effective that way." (J.A. 41)

Allowing payment to petition circulators would have assisted this "grassroots" initiative effort. Unlike the "wine in grocery store" initiative which could rely upon the employees of the grocery stores to "volunteer" their time (J.A. 26), this group did not have a built in supply of "volunteers". The State in its brief has not argued that permitting payment to petition circulators will harm "grassroots" efforts in any way. Indeed, the evidence in this case shows that it will help "grassroots" efforts. It may also help businesses and other "special interests". However, that is a separate issue which is discussed immediately below.

The State's Asserted Interest In Eliminating Undue Influence Of "Special Interests" Does Not Justify This Statute

In *Buckley v. Valeo, supra,* the United States Supreme Court sustained statutory ceilings on contributions to political candidates. The Court reasoned that the appearance of corruption justified the limitation on free speech and political association, i.e. the perception of undue influence of large contributions to a candidate.

However, this rationale does not apply to initiative measures.

> "Referenda are held on issues, not candidates for public office. The risk of corruption perceived in cases involving candidate elections . . . is simply not present

in a popular vote on a public issue." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 790 (1978).

The State in its brief implies that it has an interest in preventing those with wealth from having their initiatives placed on the ballot as a result of being able to hire paid solicitors.

Allowing solicitors to be paid may assist wealthy individuals, special interest groups and corporations to reach more registered voters and thereby obtain the required number of signatures. The state, however, does not have an interest in restricting expenditures by wealthy individuals or corporations on ballot issues.

> "*Buckley* identified a single narrow exception to the rule that limits on political activity were contrary to the First Amendment. The exception relates to the perception of undue influence of large contributors to a *candidate*. . .
>
> ". . . *Buckley* does not support limitations on contributions to committees formed to favor or oppose *ballot measures.*" *Citizens Against Rent Control/ Coalition For Fair Housing v. City of Berkeley, California,* 454 U.S. 290, 296-97 (1981). (Emphasis in original.)

Furthermore, "grassroots" campaigns which use only "volunteer" solicitors will not be harmed if other initiative campaigns are using paid solicitors. A registered voter may sign petitions on as many different issues as he wants.

> "(T)he concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment. . . ." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791 (1978). (Cition omitted.)

The State interest in having broad popular support for an initiative is protected by the number of signatures which are required to be obtained on the petition.

The Colorado constitutional provision requires petitions signed by registered voters constituting at least 5% of all those who voted for the office of the Secretary of State in the last general election, (Article V § 1, Constitution of Colorado). For the election involved in this case, 46,737 signatures of registered voters were required. Whether the signatures are obtained by "volunteers", by paid solicitors or by a combination of both, the State interest in broad public support is shown by the number of signatures. Furthermore, the petition circulator is merely involved in the first step of placing the issue on the ballot. Once on the ballot, the issue must receive a majority of the votes before it is enacted.

The Court should therefore reject the argument that the statute is necessary to insure broad-based support rather than just the support of corporations or wealthy special interest groups.

The State's Asserted Interest In Preventing Persuasive Speech Of Paid Petition Circulators Does Not Justify This Statute

The brief of the State implies that it has an interest in preventing paid petition circulators because they would

be more persuasive than a "volunteer" in convincing someone to sign a petition.

The State, however, does not have an interest in preventing persuasive speech.

> "To be sure, corporate advertising may influence the outcome of the vote; this would be its purpose. But the fact that advocacy may persuade the electorate is hardly the reason to suppress it: The Constitution 'protects expression which is eloquent no less than that which is unconvincing.'" *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 790 (1978).

The use of false or misleading statements in obtaining the petition signatures is prohibited (C.R.S., § 1-40-119). Furthermore, the State interest in ensuring that someone knows what he is signing is protected by the *red* bold-face print which appears on each petition. Under the words "WARNING: IT IS AGAINST THE LAW" appears the following language as required by statute:

> "Do not sign this petition unless you have read or had read to you the proposed initiative or referred measure or the summary of an initiated measure in its entirety and understand its meaning." C.R.S. § 1-40-106(1).

There is no evidence in the record that "paid" petition circulators would be more persuasive than "volunteer" petition circulators. However, even if they are more persuasive, the State does not have an interest in preventing persuasive speech. The governmental interest in having a petition signor know what he is signing is protected by the red, bold-faced print on the petition. The governmental interest in ensuring that there is reasonable support for the measure is protected by requiring the signatures of 5% of the electorate. The State does not have an interest in preventing initiatives which have the required number of signatures from being placed on the ballot.

—————o—————

CONCLUSION

C.R.S. 1-40-110 violates the rights of the Appellees to free speech and political association. The most effective method by which proponents of an initiative can reach registered electors with the message to sign the petition is through the petition circulator. The prohibition against paid petition solicitors limits the number of registered electors who can be reached.

The interests of the State of Colorado which the statute purportedly protects are not sufficiently important to justify the restrictions which the statute imposes on the communication of political issues. Other means are available and are presently being utilized to protect these other interests.

The interest of the State of Colorado, in preventing fraud, is met by specific statutes which make it unlawful to forge signatures, misrepresent initiatives, or pay a person for actually signing the petition. The State's interest in ensuring that there is a broad base of support before an initiative is placed upon the ballot is met by the State Constitutional requirement of obtaining the large number of required signatures.

The decisions of the United States Supreme Court firmly support the en banc opinion of the Tenth Circuit.

The United States Supreme Court has declared unconstitutional expenditure limitations on candidate campaigns. Concerning ballot issues, the United States Supreme Court has declared unconstitutional both expenditure and contribution limitations. The expenditure limitation in this ballot case should likewise be declared unconstitutional. The decision of the Tenth Circuit should therefore be affirmed.

Respectfully submitted,

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No. 87-920

IN THE
Supreme Court of the United States
OCTOBER TERM, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,
Appellants,
v.
PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND THE CALIFORNIA REPUBLICAN PARTY IN SUPPORT OF APPELLEES

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On Appeal from the United States Court of Appeals for the Tenth Circuit

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MOTION OF THE WASHINGTON LEGAL FOUNDATION AND CALIFORNIA REPUBLICAN PARTY FOR LEAVE TO FILE A BRIEF *AMICI CURIAE*

The Washington Legal Foundation (WLF) and the California Republican Party hereby move, pursuant to Supreme Court Rule 36, for leave to file the annexed brief *amici curiae* in support of the appellees in the above-

captioned proceeding. Consent to filing this brief was granted by the appellees but denied by appellants, thus necessitating the filing of this motion.

INTERESTS OF *AMICI CURIAE*

The Washington Legal Foundation, Inc. (WLF) is a non-profit tax-exempt corporation organized and existing under the laws of the District of Columbia for the purpose of engaging in litigation and the administrative process in matters affecting the broad public interest. WLF has more than 200,000 members, contributors, and supporters throughout the United States whose interests the Foundation represents.

WLF participates in and has devoted a substantial portion of its resources to cases relating to government regulations and constitutional law. In particular, WLF has appeared as *amicus curiae* in a number of cases dealing with the First Amendment rights of businesses and individuals. *See, e.g., Consolidated Edison Company v. Public Service Commission*, 447 U.S. 530 (1980); *Pacific Gas & Electric Company v. The Public Utilities Commission of the State of California*, 106 S.Ct. 903 (1986); *Reagan v. Abourezk*, 108 S.Ct. 252 (1987); and *Boos v. Barry*, 56 U.S.L.W. 4254 (U.S. Mar. 22, 1988).

The California Republican Party is that state's party organization which supports Republican candidates for state and federal office as well as engages in related party activities such as voter registration drives. In the course of engaging in these activities, the California Republican Party and its members have been able to conduct such activities as voter registration drives by expending funds as permitted under California law. Both *amici* believe that if the lower court decision in this case is reversed and the prohibition against paying circulators is upheld, such a ruling could cause other states such as California to restrict the ability of all citizens and associations to fully participate in the electoral and initiative process. Such a result would not be in the public interest regardless of one's political beliefs and outlook.

Accordingly, *amici* wish to participate in this case and to bring to this Court's attention additional arguments as to why the lower court decision should be upheld.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-920

NATALIE MEYER, in her official capacity as
Colorado Secretary of State, and
DUANE WOODARD, in his official capacity as
Colorado Attorney General,
Appellants,

v.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE,
LORI A. MASSIE, RALPH R. HARRISON,
COLORADANS FOR FREE ENTERPRISE, INC.,
a Colorado corporation,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

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BRIEF *AMICI CURIAE* OF THE WASHINGTON LEGAL FOUNDATION AND THE CALIFORNIA REPUBLICAN PARTY IN SUPPORT OF APPELLEES

INTERESTS OF *AMICI CURIAE*

The interests of *amici curiae* are set forth in the preceding motion and are adopted herein.

STATEMENT OF THE CASE

In the interests of judicial economy, *amici* adopt by reference the Statement of the Case as presented in appellees' brief. Nevertheless, *amici* wish to emphasize certain facts.

Colorado is one of 23 states which allow its citizens to place propositions on the ballot through the initiative process to change existing statutes or to amend the Colorado Constitution. Colo. Const. art. V, § 1; Colo. Rev. Stat. § 1-40-101, et seq. (1980). In order for the initiative to appear on the ballot, the proponents of the measure are required to petition the Secretary of State to put the matter on the ballot. The Secretary is required to place the initiative on the ballot if the number of "petitioners" constitutes 5 percent of the total number of voters who cast votes for all candidates for the office of Secretary of State at the last preceding general election, and if those petitioners are registered voters in Colorado. *Id.*

Under Colorado law, the circulator of the petition must sign an affidavit swearing that the signers of the petition affixed their signatures in his or her presence, and that to the best of the knowledge and belief of the affiant, the signers were registered electors or voters. *Id.*

Colorado also has a law that prohibits any payment to any person, corporation, or association for the circulation of the petition as well as prohibiting any payment to a voter or elector to sign such petition. Colo. Rev. Stat. § 1-40-110. Of the 23 states which allow initiatives, only Colorado and two other states, Washington and Nebraska, prohibit paying circulators. *See* Attachment to Joint Appendix (J.A.). Colorado does not prohibit payment to circulators of petitions to obtain signatures to qualify an individual to be on the ballot as a candidate for elective office. Colo. Rev. Stat. § 1-4-801.

The lower court originally adopted the decision of the district court verbatim and upheld the prohibition against paying circulators stating that the law only restricts "a generalized support for a political thought, much like the contribution of money was regarded in *Buckley* [*v. Valeo*, 424 U.S. 1 (1976)]. Thus, when the statute is placed in this perspective, it does not appear constitutionally onerous." *Grant v. Meyer*, 741 F.2d 1210, 1213 (10th Cir. 1984).

The Tenth Circuit granted rehearing en banc and subsequently reversed, ruling *inter alia*, that the payment to circulators was more properly characterized as "expenditures" rather than contributions as the district court had ruled, and hence, the prohibition impermissibly restricted First Amendment rights of expression. *Grant v. Meyer*, 828 F.2d 1446, 1457 (10th Cir. 1987). The Court also ruled that there were less intrusive measures available to serve both the state's asserted interest in preventing circulators from "padding" the petition and the interest in ensuring that a measure has a modicum of base support before being placed on the ballot. The Court did not, however, fully examine the nature of these asserted interests. Judges Barrett and Logan dissented.

SUMMARY OF ARGUMENT

The prohibition under Colorado law against paying individuals to circulate petitions infringes on appellees' First Amendment rights of speech, association, and the right to petition. The governmental interests asserted by Colorado to justify the prohibition—to ensure that there is a modicum of support of the initiative and to preserve the integrity of the initiative process—are not necessarily advanced by the prohibition against paying circulators. In any event, there are other measures more narrowly tailored to preserve these alleged interests. Accordingly, the lower court's decision must be affirmed.

ARGUMENT

I. THE GOVERNMENTAL INTEREST ASSERTED, THAT ONLY THOSE INITIATIVE MEASURES WITH A SIGNIFICANT MODICUM OF SUPPORT REACH THE BALLOT, IS SERVED BY LESS RESTRICTIVE MEASURES THAN BY PROHIBITING PAYMENT TO CIRCULATORS.

The only question presented by the Colorado officials in their brief in this case is whether Colorado law can constitutionally restrict payment to circulators "[i]n the interest of assuring that only initiative measures with significant modicum of support reach the ballot." Appellants' Brief at 2. An implicit corollary to this question is whether the prohibition against payment serves the compelling interest of "protecting the integrity of the process by eliminating the incentive to pad petitions and by removing the appearance of corruption." Appellants' Brief at 7. Obviously, if the petitions are "padded," then the modicum of support deemed necessary is frustrated by the inclusion of fictitious or invalid names on the petition. *Amici* will address this second issue separately below.

The interest asserted by the state, that initiative measures receive a modicum of public support, while legitimate, is nevertheless already served by the requirement that only those initiatives which have garnered the signatures of five percent of the voting electorate can be placed on the ballot. There is nothing inherent in the prohibition against paying circulators that furthers that interest. The only restriction that furthers that interest is that part of the law which prohibits paying a voter to sign the petition who may otherwise not have chosen to do so. Colo. Rev. Stat. § 1-40-110. The payment to circulators, on the other hand, has no logical relationship to the level of support that an initiative may enjoy since in all cases, the requisite number of signatures must be obtained regardless of whether the circulator is paid or

not. Indeed, since additional circulators can be utilized if payments to them were allowed, their corresponding increased exposure to the electorate would generate more support and facilitate the citizens' right to petition.

It should be noted at the outset that even obtaining the requisite number of signatures does not necessarily reflect the intensity of support for the initiative that Colorado claims it needs. Voters may simply sign the petition, even though they may be neutral on the subject matter of the initiative or are not fully informed on the issue, on the grounds that the supporters of the initiative deserve an opportunity to get their issue on the ballot and to present it to the electorate for its collective decision. These electors may simply feel that the initiative is a good "safety valve" to be utilized by the electorate regardless of the issue. Indeed, even an *opponent* of the measure may be inclined to sign the initiative hoping that a forthcoming defeat of the controversial measure at the ballot box would put that particular issue to rest once and for all. Other electors may choose to sign the petition for reasons wholly unrelated to the merits of the proposal.[1] Even the dissenting opinion below recognized that solicitors, whether paid or not, are "likely to use friendship or other appeals irrelevant to the merits to obtain signatures," and that those who sign may not necessarily vote for the measure. 828 F.2d at 1460 (Logan, J., dissenting).

If the state's interest is ensuring that the initiative has a modicum of support, then it would only seem logi-

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[1] At the trial level, appellee Paul Grant testified that he obtained some signatures when he told his solicitee, " 'Please sign, today is my birthday,' and most people said, 'Well, if [you] had said that right away, I would have signed right away. You wouldn't have had to go through most of this [explanation of the initiative measure].' " J.A. at 16. Can the state prohibit the solicitor from asking his solicitees to sign because it is his birthday? Although it was Mr. Grant's birthday, can the state prohibit a solicitor from falsely stating it was his or her birthday?

cal for the state to limit access to the initiative to only those who support the measure or would vote for it. However, since the full debate and public discussion on the merits of an initiative develop only after the measure is placed on the ballot, it is unrealistic to expect that there would be strong support for an initiative at the petition stage. Consequently, the only legitimate yardstick for gauging the general level of public support of an initiative is the percentage of signatures necessary to put the measure on the ballot. If experience indicates that five percent is too low a number, Colorado is free to raise it. But the prohibition against paying circulators does not further that interest. One could plausibly argue that paid solicitors would be more encouraged to develop support for the measure, or that more circulators could be made available to the people.

The State of Colorado, however, has attempted to argue that precisely the opposite is true, that Colorado enjoys a higher success rate of initiatives reaching the ballot vis-a-vis those states where paid circulators are permitted. *See* Appellants' Brief at 19. This counter-intuitive argument is flawed for numerous reasons. In the first place, the fact that Colorado had more initiatives on the ballot over a period of time, or a higher success rate of getting an initiative on the ballot than other states which have allowed paid circulators, tells us nothing. There could be a number of reasons that have nothing to do with the payment to circulators which may explain why Colorado has more initiatives on the ballot than some other states, ranging from the subject matter of the initiative to the fact Colorado has less stringent signature and geographical distribution requirements than some other states which have the initiative process. *See* Brief of Appellants at 19; J.A. 71-73; *see also McCleskey v. Kemp*, 107 S.Ct. 1756 (1987) (numerous variables cause jurors to "vote" for the death penalty in particular cases).

Furthermore, the absolute number of initiatives placed on ballots in various states in a given year *viz.*, only one or two, is too low a number upon which to draw any statistically significant conclusions. Similarly invalid is the dissent's observation below that "[i]nitiatives proposed through volunteer petitioners had a much greater chance of adoption." 828 F.2d at 1460 (Logan, J., dissenting). Not only is the conclusion irrelevant since the asserted state interest is ensuring that measures which *reach* the ballot have a modicum of support, not whether they ultimately pass, but the premise is invalid as well. There are a variety of reasons that may explain why one initiative may pass and another fail that have nothing to do with the funding of circulators.

No one has attempted to isolate or control the numerous variables involved in the initiative process in order to make any meaningful conclusions about the impact on the process of the use of paid or unpaid circulators. *Amici* submit that no statistician could make any such conclusions because the number of events in the data base would be too low. The only evidence on this issue submitted in the district court below was a newsletter that simply reported the raw data of the various initiative drives but which contained no expert statistical analysis of that data to explain or prove why some drives succeed and others fail. *See* 741 F.2d 1210, 1213. Thus, the district court was completely wrong to conclude that the state officials "have *proved* some provocative historical data from Colorado." *Id.* (emphasis added). One does not "prove" anything by presenting raw data.

Accordingly, any conclusion that the showing of a modicum of support for an initiative is served better by volunteers rather than by paid circulators, (a) is unwarranted and unproven, (b) was apparently not a reason articulated by the Colorado legislature when it passed the law in 1941, and (c) is irrelevant to fur-

thering the initiative process because the "safety valve" still remains available for those who cannot afford paid circulators and must rely on volunteers. Indeed, if the state is correct, those proponents having the option of using paid or unpaid circulators would choose unpaid circulators if their initiative has a better chance of getting on the ballot and passed.

If this Court were to uphold Colorado law on the grounds that the prohibition against payments to circulators furthers the governmental interest of ensuring that an initiative has a modicum of support, then the government can limit the ability of citizens and organizations to engage in other types of petition drives. For example, the state could prohibit paying vendors to conduct grassroots campaigns encouraging citizens to sign a petition addressed to their Congressman urging the introduction of legislation on the pretext that such petitions, generated by paid vendors, are not truly indicative of a modicum of support that would come from volunteer efforts.

The "logic" of this position could justify the placing of other obstacles in the path of securing signatures to ensure a stronger support if the signers or solicitors were to overcome those burdens. Could Colorado, for example, restrict the time for soliciting signatures between the hours of midnight and 2 a.m. because experience shows that if circulators and solicitees stayed up that late to get the requisite number of signatures, then surely they must be strongly committed to their cause? While this hypothetical is extreme, the principle is the same with respect to the obstacle of prohibiting all payments to circulators.

If the state's interest is a modicum of support for the initiative, that interest is already served by the requirement of securing a minimum number of signatures. The *strength* of the numerical support is not a valid state interest because it opens the door for the state to inquire into the reasons why a person signed the petition.

II. THE INTEREST IN PRESERVING THE INTEGRITY OF INITIATIVE PROCESS, *I.E.* TO PREVENT CIRCULATORS FROM "PADDING" THE PETITION, CAN BE SERVED BY LESS RESTRICTIVE MEASURES WITHOUT VIOLATING THE FIRST AMENDMENT.

The Colorado officials argue that a second compelling governmental interest is to "protect[] the integrity of the process by eliminating the incentive to pad petitions and by removing the appearance of corruption." Appellants' Brief at 7. The majority opinion below assumed the legitimacy of this concern but correctly noted that there were laws more narrowly tailored to prevent the specific abuses:

> Colorado has existing statutes that make it unlawful to forge a signature on a petition, to make false or misleading statements relating to a petition, or to pay someone to sign a petition. *See* Colo.Rev.Stat. §§ 1-13-106, 1-40-119, 1-40-110 (1980). The statutes also require that conspicuous warnings of criminal offenses be printed on every petition and that circulators attach an affidavit attesting, *inter alia*, to the validity of the petition's signatures. *See* Colo.Rev.Stat. §§ 1-40-106 (1986 cum.supp.); *see also* Colo. Const. art. V, § 1. Finally, the Colorado statutes provide elaborate protest procedures for challenging the sufficiency of signatures on any petition, permitting both an administrative determination and an opportunity for judicial review. *See* Colo.Rev.Stat. §§ 1-40-109 (1986 cum.supp.). Thus the State's "legitimate interest in preventing fraud can be better served by measures less intrusive than a direct prohibition or solicitation" by paid circulators of petitions. *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. at 637, 100 S.Ct. at 836.

Id. at 1454. The court also noted that under the teachings of *Buckley v. Valeo* and its progeny, restrictions on

financial expenditures in connection with the exercise of First Amendment rights cannot be totally prohibited. 828 F.2d 1446, 1457.

Even the dissent below found Colorado's integrity argument to be "wholly unconvincing" noting that circulators, whether paid or not, would not likely commit a felony to pad their petitions, and that an "overzealous volunteer would in fact seem more likely to overstate supporting arguments for the proposition than the paid solicitor . . . ." 828 F.2d at 1460, at n.2.[2]

Accordingly, the prohibition against paying circulators is not narrowly tailored to remedy the perceived problem of the possibility of padding the petitions. *See also Boos v. Barry*, 56 U.S.L.W. 4254, 4256 (U.S. Mar. 22, 1988) (congressional enactment of a narrowly tailored law to protect diplomatic facilities located outside of the District of Columbia is evidence that the more broadly worded law prohibiting demonstrations near embassies located within the District of Columbia is overbroad).

Since there are already adequate safeguards to preserve the integrity of the process without the prohibition against paying solicitors, the only remaining interest asserted by Colorado is the avoidance of the "appearance of impropriety." Appellants' Brief at 18. Admittedly, *Buckley* held that although bribery laws existed to prevent actual corruption, the "appearance of corruption" with respect to the giving and receipt of large contributions to candidates and officeholders was a legitimate interest and could justify the contribution limits.

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[2] While it is true that under Colorado law, the affidavit of the circulator stating that the names on the petition were actually signed by the individual is prima facie evidence of their validity, in reality, these petitions are routinely challenged by opponents of the initiative. Consequently, invalid names are deleted from the count necessary to achieve the statutory threshhold of signatures, regardless of whether the circulators were paid or not.

424 U.S. 1, 28 (1976). *Amici* submit, however, that the state's argument is flawed for two reasons. First, there is no corresponding "appearance of corruption" concern in the initiative process. The only possible corruption is the actual "padding" of the names on the petition, but those names can be and are usually checked for their validity. In the campaign contribution context, however, there is no similar check to prevent the candidate from returning a "quid" for a large "quo."

Secondly, and more importantly, the payment to the circulator is not the equivalent of giving a "contribution" to a candidate, but rather is more like a candidate "expending" funds to further his message, which may even entail paying circulators to get the candidate's name on the ballot. This Court held in *Buckley* that while contributions to candidates may be limited, expenditures by candidates may not be. *Amici* agree, therefore, with the lower court's analysis that the proponent of an initiative is not merely expressing a generalized support for the initiative by paying a circulator or engaging in "speech by proxy;" rather, the proponent is more like the candidate expending funds to advocate his particular message, a message whose specific words were chosen by the proponent and embodied in the initiative. 828 F.2d at 1457.

Furthermore, the Supreme Court has repeatedly and emphatically drawn the distinction between the compelling state interest involved in a political campaign and ballot measures by striking down restrictions limiting contributions and expenditures for the latter. For example, in *Citizens Against Rent Control/Coalition for Fair Housing v. City of Berkeley, California*, 454 U.S. 290 (1981), the Court noted that the limits upheld in *Buckley* were a "narrow exception" to the rule that limits on political activity were contrary to the First Amendment," and that *Buckley* dealt with the influence of large contributions on a candidate and not on ballot

measure activities. *Id.* The Court concluded that "there is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Id.*

Even assuming arguendo that payments to circulators are more like contributions than expenditures, and assuming that there is a legitimate interest in preventing the "appearance of corruption," the current Colorado law banning *all* payments is *per se* unreasonable and not narrowly tailored to address this concern.

Even in the context of campaign contributions, where Congress can regulate, the individual contribution limit is set at $1,000 per candidate. A complete ban on all contributions to candidates would surely violate the First Amendment.[3] Likewise, a complete ban on all payments to circulators is overbroad. Implicit in the state's argument is the unsupported notion that those who are paid on the basis of the number of signatures secured would "pad," or "appear to pad" their petitions. This concern, however, can be addressed more narrowly by limiting only that particular method of payment, *i.e.*, a payment calculated on the basis of the number of signatures obtained, rather than by prohibiting *all* forms of payment. For example, if a circulator were to be paid a flat rate of five dollars an hour for manning a table outside of a grocery store to solicit signatures, regardless of the number of signatures obtained, the likelihood of corruption or appearance of corruption is nil. Yet Colorado law prohibits both flat rate payments as well as payments based on the number of signatures, even though both methods of payment are used in those states which permit the payment of solicitors. *See* J.A. at 31.

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[3] In addition, the disclosure requirements under the campaign laws also serve to limit the appearance of corruption. Colorado could enact a corresponding disclosure provision, such as requiring paid solicitors to tell their solicitees that they are being paid for their efforts, a less intrusive restriction that would serve the state's alleged interest.

In the final analysis, even the State of Colorado must admit that the alleged governmental interests are not served by the prohibition against payments when they overstate their case by describing the First Amendment rights that can be exercised under the current scheme:

> The statute in no way prohibits interested citizens from spending unlimited amounts of money or from associating at will to express their views. The proponents can buy time on television or radio. They can purchase advertising space in newspapers. *They can hire unlimited numbers of persons as advocates to canvas neighborhoods* or to speak at functions. They can distribute leaflets. *They can approach citizens and ask them if they are registered voters. They can even direct them to the [unpaid] petition circulators.*

Appellants' Brief at 19 (emphasis added).

According to the State of Colorado, a proponent of a measure can hire canvassers and advocates who can (1) "approach citizens and ask them if they are registered voters," (2) presumably can solicit those persons' signatures, and finally (3) "direct them to petition circulators" standing next to them whose only function under state law is to witness face-to-face the signing of the petition. These unpaid circulators would have no problem attesting to the fact that these individuals are registered to vote since they have just heard that information being told to the paid advocate. Under this scenario, the unpaid circulator need not utter a single word but merely silently witness the signing of the petition while the paid advocate does all the talking. If this scenario is possible under Colorado law, then the paid advocate can be paid based upon the success of his advocacy efforts, *i.e.*, the number of signatures appearing on the unpaid circulators petition, without violating Colorado law. Accordingly, all of the governmental interests allegedly served by prohibiting payments to circulators apparently can be circumvented by having paid advocates pitch their

case and then steer the voter to the unpaid, mute circulator. As the Supreme Court noted in *Buckley v. Valeo*, in striking down the limits on independent expenditures, "no substantial societal interest would be served by a loophole-closing provision designed to check corruption" when the law would permit other conduct that circumvents the prohibition. 424 U.S. at 45.

If that is the case, the only reason for not permitting payment to circulators for their time manning registration tables is to simply limit the exercise of the petition process itself, a fundamental First Amendment activity, and to penalize those proponents who cannot afford to take time away from work or family commitments to generate grassroots support for an initiative that they strongly believe in. As this Court has long noted, "the very idea of a government, republican in form, implies a right on the part of its citizens to meet peaceably for a redress of grievances." *United States v. Cruikshank*, 92 U.S. 542, 552 (1876). "The Speech and Press Clauses, every bit as much as the Petition Clause, were included in the First Amendment to ensure the growth and preservation of democratic self-governance," and that these clauses are "*interrelated components* of the public's exercise of its sovereign authority." *McDonald v. Smith*, 472 U.S. 479, 489 (1985) (Brennan, J. concurring) (emphasis added).

Thus, the right to petition is interrelated with the right of free speech, and any limits on the exercise of the right to petition necessarily affects free speech rights. But even if the rights could be separated, *amici* contend that the Colorado law impermissibly restricts the conduct component of petitioning. In essence, in order to have a valid petition under Colorado law, a citizen must be presented with a prescribed petition and affix his or her name thereon. At that point in time, the citizen has become one of many petitioners. This discrete conduct constitutes the legal act of petitioning since the petitions are addressed to the Secretary of State commanding that official to place the initiative on the ballot. Accordingly, laws such as Colorado's which limit the opportunity for citizens to have access to the petition document itself, limits the exercise of the right to petition, as well as the right to associate or assemble, even if the state is correct that the free speech component of the petitioning process remains unfettered. Viewed in this perspective, the state has not demonstrated a sufficiently compelling governmental interest for so limiting the right to petition and the interrelated right of association.

If the state can prohibit the payment to individuals to garner citizen support and collect signatures for initiatives in order to preserve the integrity of the initiative process, then similar laws can be enacted to limit the payment to individuals for their time and effort in working on voter registration drives, or for gathering the necessary signatures to place a candidate's name on the ballot. While neither of these latter activities are currently prohibited by Colorado law, *amici* can see no fundamental differences between the state's interest in the integrity of the initiative process to prohibit the "padding" of the petition with fictitious or unqualified names and the registering of an unqualified person to vote.

CONCLUSION

For all the foregoing reasons, *amici* urge this Court to affirm the lower court decision.

Respectfully submitted,

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No. 87-920

In The

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NATALIE MEYER, in her official capacity as Colorado Secretary of State, and DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

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PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, and COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO, AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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QUESTION PRESENTED

Whether Colorado's complete ban on any form of compensation for circulation of initiative petitions unconstitutionally restricts advocates' and petition circulators' right of free political expression guaranteed by the First and Fourteenth Amendments.

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ON APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, THE AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF COLORADO, AND THE AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA AS AMICI CURIAE IN SUPPORT OF APPELLEES

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INTEREST OF THE AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 members dedicated to protecting and preserving civil rights and civil liberties guaranteed by law. The American Civil Liberties Union Foundation of Colorado and the American

Civil Liberties Union of the National Capital Area are affiliates of the American Civil Liberties Union.[1]

Since its creation over sixty years ago, the American Civil Liberties Union, with its affiliates, has worked to promote and ensure the constitutional operation of state and federal electoral systems. *Amici* are particularly concerned about governmental burdens on the electoral process and have participated, both as parties and as *amici*, in numerous cases challenging such burdens.[2]

The Colorado statute at issue here, which prohibits the proponents of an initiative measure from compensating petition circulators for their efforts to qualify the measure for a general election ballot, is intended in part to mute the voices of certain initiative proponents and to restrict the types of initiatives that are presented to voters on the ballot. *Amici* submit that such a restriction is invalid under the First and Fourteenth Amendments and that the decision below of the United States Court of Appeals for the Tenth Circuit is correct. Because this Court's decision will have a direct effect on matters of great importance to *amici* and their members, *amici* submit this brief to assist the Court in its resolution of the case.

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[1] Pursuant to Rule 36.2 of the Rules of the Court, the parties have consented to the filing of this brief. Letters of consent from their counsel have been filed with the Clerk of the Court.

[2] The American Civil Liberties Union of the National Capital Area recently participated as an *amicus* in *Ficker v. Montgomery County Board of Elections*, 670 F. Supp. 618 (D. Md. 1985), which invalidated a provision similar to the statute at issue here.

STATEMENT OF THE CASE

Since 1910, the Colorado Constitution has reserved to the citizens of Colorado the right to enact legislation directly through the initiative process. Colo. Const. art. V, § 1. At least five percent of voters, measured by the total number of votes cast in the previous election for Secretary of State, must sign a petition to qualify an initiative measure for the general election ballot. *Id.* Under Colorado law, the state legislature may enact procedural regulations and measures to prevent fraud in the initiative process, but these must "further the purpose" of the process rather than curtail it. *Colorado Project-Common Cause v. Anderson*, 178 Colo. 1, 5, 495 P.2d 220, 221-22 (1972).[3]

[3] *Amici* wish to alert the Court that there may be adequate and independent state-law grounds for invalidating the statute. In article V, § 1 of the Colorado Constitution, the right of initiative is "expressly declared to be self-executing, and as such, only legislation which will further the purpose of the constitutional provision or facilitate its operation, is permitted." *Anderson*, 178 Colo. at 5, 495 P.2d at 221-22. The Colorado Supreme Court has therefore held invalid legislation that "directly or indirectly limits, curtails or destroys" the right to the initiative. *Id.* at 5, 495 P.2d at 222. While the Colorado Supreme Court has not addressed the specific issue presented here, it has permitted only legislation that regulates the voting process or prevents fraud. *See, e.g., Baker v. Bosworth*, 122 Colo. 356, 363, 222 P.2d 416, 419 (1950).

Amici recognize that the Court does not normally consider issues of state law not raised below, but note the state law issue because the Court may wish for prudential reasons to remand the case for consideration of the question, *see Neese v. Southern Railway Co.*, 350 U.S. 77, 78 (1955), or perhaps certify the question to the Colorado Supreme Court. *See Virginia v. American Booksellers Association*, 108 S.Ct. 636, 643-45 (1988); *Elkins v. Moreno*, 435 U.S. 647, 658-62 (sua sponte certification of potentially dispositive state-law question); Colorado Appellate Rule 21.1 (certification procedure).

In 1941, the Colorado legislature enacted a statute that prohibits payment for the circulation of initiative petitions. Colo. Rev. Stat. § 1-40-110 (1980 Repl. Vol.) (hereinafter "the statute"). Colorado is one of only three states which impose any restriction on payment of petition circulators. Def. Ex. E, J.A. 71, 99.

In 1984, the statute stymied five individuals and a corporation favoring the deregulation of motor carriers in their effort to qualify a deregulation initiative proposal for the general election ballot. J.A. 19-20. The corporation, Coloradans for Free Enterprise, Inc., was founded in 1982 "to promote free market solutions" to problems in Colorado. J.A. 12. The individuals included a chemical engineer and a certified public accountant. J.A. 13, 45. The initiative proponents filed the instant case in the United States District Court for the District of Colorado, seeking a declaration that the statute violated their rights under the First and Fourteenth Amendments to the United States Constitution, as well as an injunction against its enforcement.

Proponents of the initiative measure testified at trial that they sought support and comment from a "broad-based group of citizens" before drafting the measure, including state legislators and those in the transportation industry. A number of these endorsed the proposal. J.A. 13-15. Support for the petition drive came from limousine companies, small trucking companies, "tiny" cab companies, "potential" business people, and some who had recently been denied licenses by the Colorado Public Utilities Commission. J.A. 25, 42.

The proponents who testified had both circulated petitions themselves and recruited other solicitors, and they described the manner in which petition circulators solicit signatures. The circulator first asks if the potential signer is a registered voter. If so, and if the person is

receptive, the circulator then describes the proposal and engages the voter in a dialogue about the merits of the proposal. The circulator may tailor his argument to individual circumstances or objections, or may simply describe the public benefits of the measure. If he persuades the voter that the proposal deserves to be placed on the ballot, he obtains the voter's signature on a petition form. J.A. 16-17, 30-31, 40-41, 47. Proponents testified that the ban on compensation necessarily diminished the time they could spend soliciting, it also reduced their ability to motivate others to participate in the "painful" solicitation process. J.A. 19, 39-40, 42, 47.

The State's expert witness expressed several concerns about the use of paid circulators in the initiative process —for example, that certain issues were too complex to be submitted directly to the voters, that the Colorado Constitution was "too liberal" with respect to initiatives, and that she found payment to petition circulators "personally distasteful." J.A. 87, 88, 95.

The district court denied relief, on the premise that the statute did not significantly affect First Amendment rights because it limited only the ability of the plaintiffs to pay others to speak and did not otherwise restrict their ability to publicize their beliefs. The district court found the statute analogous to limitations on contributions to candidates, and further considered the asserted state interests compelling. A panel of the Tenth Circuit affirmed, adopting the district court opinion.

On petition for rehearing, the Tenth Circuit *en banc* reversed by a vote of six to two, holding the statute invalid under the First and Fourteenth Amendments. The Court reasoned that the statute limited political speech by restricting independent expenditures in support of ballot measures and found that the State's asserted interests were not compelling under those circumstances.

The Court noted that other measures adequately addressed the State's expressed concerns about fraud and sufficient public support in the initiative process.

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SUMMARY OF ARGUMENT

Colorado's complete prohibition on any form of compensation for the circulation of initiative petitions is a direct restraint on political speech which must be measured by the exacting scrutiny applicable to governmental restrictions on core First Amendment rights.

The statute restricts independent expenditures by initiative proponents to further their advocacy of ballot measures. In a series of opinions over more than a decade, the Court has consistently held that similar restrictions burden core First Amendment rights and are subject to strict scrutiny. None of the arguments advanced by the State justifies the application of any other analysis here.

Contrary to the State's suggestion, the statute directly restricts *appellees'* speech, not the speech of others. Compensation of circulators under the facts of record differs in no material way from a citizen's purchase of an advertisement or payment to a lobbyist. The recipient exercises no independent discretion over whether and how funds will be spent, but is in effect the "mouthpiece" of the payor. Furthermore, the appellees here wish not only to pay, but also to be paid themselves, for petition circulation.

The State's argument that the signature-verifying obligation of petition circulators transforms them into public election officials is not based on relevant authority or legislative findings. The fact that the State, for its own administrative convenience, chooses not to verify petition

signatures by any regular process cannot strip initiative proponents of their First Amendment rights.

Appellants' contention that the statute restricts only conduct and not speech ignores *Buckley v. Valeo*, 424 U.S. 1 (1976), and its progeny, which establish that restrictions on independent campaign expenditures directly regulate speech. Moreover, the record demonstrates that the essential function of the petition circulator is to persuade voters through political speech, and that banning payment for circulators' activities reduces the quantity of speech and debate by reducing the available pool of circulators. By the State's own admission, the statute is designed to mute the speech of the wealthy and preserve the "grassroots" nature of the initiative. Given these goals, the statute is content-based and not a mere "incidental" restriction of speech.

Strict scrutiny is not inappropriate merely because initiative proponents may make expenditures other than for petition circulators. The Court's campaign spending cases hold that regulation need not foreclose all avenues of expression or impose an absolute expenditure ceiling to elicit strict scrutiny.

Neither of the interests the State advances to support the statute is compelling, and the statute therefore cannot withstand strict scrutiny. The first interest—in ensuring that initiative measures placed on the ballot have a minimal level of public support—is adequately served by the Colorado constitutional requirement that a specified number of signatures be obtained before an initiative reaches the ballot. The State's argument that petition circulators must spring spontaneously and voluntarily forward at the outset of the qualification process ignores the fact that the necessary level of public support may be achieved if proponents are free to exercise fully their First Amendment rights of persuasion and debate. The State has no

legitimate interest in curtailing or restricting debate concerning ballot measures.

As for the second interest—in maintaining the "integrity" of the initiative process and preventing the "appearance of corruption"—appellants fail to specify the nature of the State's concerns or how they are served by the statute. The Court has held on several occasions that preventing corruption is not a legitimate concern in campaigns for ballot measures, and there is no evidence here that paid circulators are any more likely to obtain fraudulent signatures than are volunteers. In any event, existing criminal penalties for fraud are entirely adequate to address any legitimate interest in preventing corruption.

ARGUMENT

I. THE COURT MUST APPLY THE EXACTING LEVEL OF SCRUTINY APPROPRIATE TO REGULATION WHICH RESTRICTS POLITICAL EXPRESSION AT THE CORE OF THE FIRST AMENDMENT'S PROTECTION.

The Colorado statute imposes a criminal prohibition on spending money to disseminate political speech. Its sanction "operates at the core of the First Amendment by prohibiting [appellees] from engaging in classically political speech," *Boos v. Barry*, 56 U.S.L.W. 4254, 4256 (U.S. Mar. 22, 1988); the statute must therefore "be subjected to the most exacting scrutiny." *Id.* at 4257.

A. The Statute Prohibits Political Expression at the Core of First Amendment Protection.

Uncontested evidence at trial established that the essential role of the initiative petition circulator is to engage voters in a dialogue about the merits of the proposed

measure, and, if possible, to persuade them that the proposal deserves a place on the general election ballot. J.A. 15-18, 39-41, 48. Given that fact, Colorado's prohibition on the payment of circulators

> operate[s] in an area of the most fundamental First Amendment activities. Discussion of public issues . . . [is] integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such political expressions in order "to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people."

Buckley, 424 U.S. at 14 (quoting *Roth v. United States*, 354 U.S. 476, 484 (1957)). *See also Mills v. Alabama*, 384 U.S. 214, 218-19 (1966).

Colorado's defense of the statute rests on a fundamentally mistaken premise: that the State may prohibit expenditures in support of a ballot measure without restricting speech in any constitutionally significant way. It has long been established that speech does not forfeit its constitutional protection because expenditures are involved in its dissemination. *E.g., New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964) (paid advertisement). Directly or indirectly, all of appellants' characterizations of the statute seek to evade this Court's express recognition that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." *Buckley*, 424 U.S. at 19.

In the context of campaign financing, this Court has emphasized time and again that, because of the importance of money in communicating ideas, a restriction on expenditures in a political campaign "necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.; accord Federal*

Election Commission v. Massachusetts Citizens for Life, Inc., 107 S. Ct. 616, 624 (1986); *Federal Election Commission v. National Conservative Political Action Committee*, 470 U.S. 480, 493-94 (1985) (hereinafter "*NCPAC*") ("the expenditures in this case produce speech at the core of the First Amendment"). As the Tenth Circuit noted in its opinion below, "[t]he clear import of the decisions of the Supreme Court is that restraints on political association and communication, imposed by restrictions on financing of campaigns for ballot measures, are suspect and subject to strict scrutiny." *Grant v. Meyer*, 828 F.2d 1446, 1452 (10th Cir. 1987) (en banc).

Because soliciting signatures is arduous and time-consuming, the pool of available volunteers may be inadequate to qualify an initiative measure for the ballot within prescribed time limits. Even measures with broad popular support may fail to qualify if proponents are prevented from enlisting additional advocates by providing compensation to circulators. Prohibiting such expenditures "impedes the sponsor's opportunity to advance his political views . . . ; it curtails the discussion of issues that normally accompanies the circulation of petitions; and it restricts the size of the audience that can be reached." *Ficker v. Montgomery County Board of Elections*, 670 F. Supp. 618, 620 (D. Md. 1985). Such a limitation "directly and inevitably restricts 'the amount of money a person or group can spend on political communication during a campaign.'" *Hardie v. Fong Eu*, 18 Cal. 3d 371, 376-77, 134 Cal. Rptr. 201, 203, 556 P.2d 301, 303 (1976), *cert. denied*, 430 U.S. 969 (1977) (quoting *Buckley*, 424 U.S. at 19).

In its brief, the State emphasizes that the initiative is intended to ensure the individual citizen's right to affect the political process. The State fails to recognize, however, that spending money on petition circulators has the same function: such expenditures express

"political preferences," and thereby constitute participation "in the free discussion of governmental affairs." BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Calif. L. Rev. 1045, 1053 (1985). Even more clearly than the indirect limit on expenditures to support or oppose ballot measures struck down in *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981), Colorado's statutory prohibition of payments to petition circulators operates "as a direct restraint on freedom of expression of [those] desiring to engage in political dialogue concerning a ballot measure." *Id.* at 299.[4]

B. Compensation of Circulators Does Not Constitute "Speech by Proxy."

Appellants seize upon language in *California Medical Association v. Federal Election Commission*, 453 U.S. 182 (1981), to argue that appellees' own First Amendment rights are not restricted because they seek to employ others to speak for them. Brief for Appellants at 15. The

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[4] Appellants' argument that the State can limit the "right" to the initiative because the State created that right is based on an erroneous premise. *See* Brief for Appellants at 14. The initiative in Colorado is not a right that the State created and granted to the people; rather, it is a right that the people of Colorado have reserved to themselves. Colo. Const. art. V, § 1. The State's argument is also flawed in its reliance on *Posadas de Puerto Rico Associates v. Tourism Co.*, 478 U.S. 328 (1986). *Posadas* involved commercial speech. This case, by contrast, involves "[d]iscussion of public issues" and "political expression," to which the First Amendment "affords the broadest protection." *Buckley*, 424 U.S. at 14. *See also Boos v. Barry*, 56 U.S.L.W. 4254, 4256 (U.S. Mar. 22, 1988) ("We have recognized that the First Amendment reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open,' and have consistently commented on the central importance of protecting speech on public issues") (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)).

discussion of "speech by proxy" in that case has no application to the circumstances here.

Writing for a plurality of the Court in *California Medical Association*, Justice Marshall explained *Buckley's* distinction between independent expenditures and contributions to candidates or candidate committees. *California Medical Association* involved a limitation on the amount of contributions by an unincorporated association to a "multi-candidate political committee" under federal campaign finance law.

Buckley emphasized that the First Amendment interests of a contributor to a candidate's campaign are more attenuated than those involved in independent expenditures on behalf of the same candidate, because the recipient of a campaign contribution retains complete discretion to determine how the funds will be spent. 424 U.S. at 20-21. *Buckley* viewed a contribution as a "general expression of support for the candidate and his views," an "undifferentiated, symbolic act" which provided "a very rough index of the intensity of the contributor's support." *Id.* at 21. "While contributions *may* result in political expression . . ., the transformation of contributions into political debate involves speech by someone other than the contributor." *Id.* (emphasis added). In *California Medical Association*, Justice Marshall described this relationship, in which a contributor delivers funds to a candidate or candidate committee with no restriction on what will be done with the money, as "speech by proxy." 453 U.S. at 196-97.

No similar considerations apply to this case. No candidates or candidate committees are involved. Just as in the paradigm case of independent expenditures to purchase advertising in the public media, appellees seek to compensate "surrogates," to use the State's own term, to "advocate their positions to the public." Brief for Appellants at 15. Hiring college students to carry the message to registered voters differs in no principled way from other forms of direct expenditures for advertising. *See* J.A. 47. Such a surrogate functions as a "mouthpiece" to transmit and amplify the specific political message of the person who pays him. *See California Medical Association*, 453 U.S. at 196.

Moreover, some appellees testified that *they themselves* would be free to devote more time to advocacy and solicitation for the initiative measure if they could be compensated for their efforts. J.A. 19, 38-39. Others testified that they could use their time more efficiently by spending money earned through their own employment to hire spokesmen, perhaps more skilled at public interaction and persuasion, perhaps with more time available to engage in solicitation. J.A. 46-47. ***In neither case does the recipient exercise independent discretion with respect to how the funds are to be expended,*** as is the case in contributions to a candidate or candidate committee.

Where, as here, proponents of a ballot measure themselves choose the means by which their message will be disseminated, and that choice grants no discretion to another in deciding how to expend funds, the speech-by-proxy doctrine is inapplicable and the choice is protected by the First Amendment. *See The Supreme Court 1984 Term—Leading Cases*, 99 Harv. L. Rev. 120, 228 (1985) ("In *NCPAC*, as in *Berkeley*, the Court accurately perceived that individuals who contribute modest sums of money to PACs are selecting a means of broadcasting their views, and that the first amendment protects this choice as fully as it protects the decision to make a direct independent expenditure.").[5]

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[5] Without reference to the record or citation of authority, the State contends that "this case does not involve many small contributors who want to add their voices to the message."

(Continued on following page)

C. Petition Circulators and Proponents Do Not Surrender Their First Amendment Rights by Verifying Signatures.

Appellants suggest that the simple requirement that those who gather petition signatures sign an affidavit attesting to the validity of the signatures somehow strips petition circulators and proponents of their First Amendment rights. *See* Brief for Appellants at 12. But the State's failure to provide any mechanism for independent signature verification hardly converts the circulator into a neutral government official.[6] That contention was rejected by both the majority and the dissenters below. *Grant v. Meyer*, 828 F.2d 1446, 1453 n.10, 1460 n.2 (10th Cir. 1987) (en banc). Circulators are more nearly analogous to lobbyists, whose activities are clearly protected by the First Amendment. *See Regan v. Taxation With Representation*, 461 U.S. 540, 552 (1983) (Blackmun, J., concurring).

Appellants' reliance on *Branti v. Finkel*, 445 U.S. 507, 517-18 (1980), is misplaced. The suggestion in *Branti* that a policy-making state employee might be replaced

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Brief for Appellants at 15 n.4. In fact, the record suggests that associational rights may well be implicated by the State's ban on paid petition circulators; Lori Massie, a fundraiser for the corporate appellee, testified that with a ban on paid solicitors, it was not worth her while to spend the limited time available raising funds rather than seeking volunteers. J.A. 43. A ban on expenditures may adversely affect the collective right of initiative proponents to pool their funds to engage full-time advocates and thereby to amplify their voices. Such collective action is "entitled to full First Amendment protection." *NCPAC*, 470 U.S. at 495. *See City of Berkeley*, 454 U.S. at 296.

[6] Those who sign petitions represent by their signatures that they are qualified electors, and are subject to criminal sanctions if they sign improperly. Colo. Rev. Stat. § 1-40-118 (1980 Repl. Vol.). Under the State's theory, do they also become government officials and waive First Amendment rights?

after a change of administrations, based on his political affiliation, cannot be extended to a holding that initiative proponents may be deprived of their rights to political expression and association merely because the State chooses not to verify signatures independently. *See Elrod v. Burns*, 427 U.S. 347, 360 n.13 (1976) (rejecting contention that public employees waive First Amendment rights by accepting employment). *See also Tashjian v. Republican Party*, 107 S. Ct. 544, 551 (1986) (state may not restrain party's freedom of association for reasons of its own administrative convenience).[7]

The Court has recognized that restricting payment to solicitors burdens First Amendment rights even where the subject of the solicitation is charitable rather than political. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947 (1984); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (striking as overbroad a city ordinance denying permits to charitable solicitors with high administrative costs). Where the solicitation is for support of a public ballot issue, and the regulation bans *all* payment to solicitors, it is idle to suggest that the statute "regulates the conduct of a state function only." Brief for Appellants at 11.

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[7] The only legal authority the State cites for the proposition that the petition circulator is "envisioned" as a state official is *Sturdy v. Hall*, 143 S.W.2d 547, 550 (Ark. 1940). Brief for Appellants at 9. That case was not concerned with the constitutional rights of initiative proponents or with the propriety of payment to circulators. In fact, the court noted that the Arkansas constitution forbade any legislative restriction on payment of circulators. *Id.* The court's reference to "election judges" was in the context of a discussion whether petitions containing fraudulent signatures should be invalidated in part or *in toto*.

D. Colorado's Ban on Payment of Circulators Is Not a Reasonable, Incidental Restriction on the Time, Place, or Manner of Speech.

The principle that speech does not lose its protected status because it is associated with compensation is well settled. *Secretary of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 n.6 (1984); *New York Times Co. v. Sullivan*, 376 U.S. 254, 265-66 (1964). Under *Buckley* and its progeny, the Colorado statute is invalid as a restriction on independent expenditures in support of a ballot measure. To evade that result, appellants argue that the Colorado statute regulates conduct, and that the statute's validity must be judged by the standards set forth in *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789 (1984), and *United States v. O'Brien*, 391 U.S. 367 (1968).

1. The Statute Does Not Regulate the Time, Place, or Manner of Speech.

The plain language of the statute does not purport to regulate the "time," the "place," or the "manner" of speech by petition circulators. Under the statute, a "volunteer" circulator is free to buttonhole voters at any time and place, and in any fashion, without encumbrance from the State. The statute only criminalizes the same kind of expression by a speaker who receives compensation. As in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), which struck down a restriction on corporate expenditures for referenda, the prohibition is keyed to the nature of the speaker and therefore clearly implicates First Amendment rights: "In the realm of protected speech, the legislature is constitutionally disqualified from dictating the subjects about which persons may speak and the speakers who may address a public issue." *Id.* at 784-85. Although the statute at issue here does not seize upon the corporate form as the basis of discrimination, the effect of the prohibition is similar.

2. Restrictions on Electoral Spending Directly Regulate Speech, Not Merely Conduct.

Appellants' argument amounts to a claim that the First Amendment protects speech but not spending. This Court has consistently rejected that argument in considering restraints on electoral spending. As the Court noted in *Buckley*, 424 U.S. at 16, "We cannot share the view that . . . contribution and expenditure limitations are comparable to the restrictions on conduct upheld in *O'Brien*." The Court has *never* analyzed restrictions on political expenditures as an "incidental" restraint on speech under the rubric of *O'Brien*. *See, e.g., NCPAC*, 470 U.S. at 493 (independent expenditures "produce speech at the core of the First Amendment"); *City of Berkeley*, 454 U.S. at 299 ("limits on expenditures operate as a direct restraint on freedom of expression"). Indeed, political giving is itself a communicative act; it is precisely because spending has communicative significance that the State seeks to regulate it. *See* BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 Calif. L. Rev. 1045, 1058-59 (1985); Brief for Appellants at 17.

Furthermore, the trial record and common knowledge establish that the circulator of a petition engages in political speech as a means of persuading voters to sign the petition. J.A. 15-18, 40-41, 48; *see Ficker v. Montgomery County Board of Elections*, 670 F. Supp. 618, 619-20 (D. Md. 1985); *Hardie v. Fong Eu*, 18 Cal. 3d 371, 376, 134 Cal. Rptr. 201, 203, 556 P.2d 301, 303 (1976), *cert. denied*, 430 U.S. 969 (1977). Indeed, the district court opinion in this case (adopted by the majority of the Tenth Circuit panel) acknowledged appellees' testimony that "it is often necessary to educate and argue with potential petition signers to convince them the issue is one which should be considered by the general electorate." *Grant v. Meyer*, 741 F.2d 1210, 1212 (10th Cir. 1984), *vacated*, 828 F.2d

1446 (10th Cir. 1987) (en banc). That the restricted activity involves money as well as speech does not make the *O'Brien* test applicable. "[T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment." *Buckley*, 424 U.S. at 16 (citations omitted). *See also Sullivan*, 376 U.S. at 165-66.

3. Vincent Is Inapplicable.

Members of City Council v. Vincent, 466 U.S. 789 (1984), did not displace the consistent line of analysis this Court has applied from *Buckley* to *Massachusetts Citizens for Life*. *Vincent* dealt with a city's right to control the use of its own property, not with electoral spending limitations. The statute at issue here cannot be viewed as "unrelated" to the suppression of speech, as was the anti-litter ordinance in *Vincent*. 466 U.S. at 805. Rather, Colorado's ban on paid solicitors imposes a preference for "voluntary" speech by criminalizing the political speech of compensated circulators.

While the statute does not in terms single out any specific point of view for sanction, the State itself proclaims that the statute preserves the "grassroots nature" of the initiative, Brief for Appellants at 7, and protects against the "undue influence of wealth." *Id.* at 17. Quite apart from the question whether these asserted interests are legitimate at all, *see* Section IIA *infra*, the State's claims are a frank admission that the purpose of the statute is to favor certain kinds of speakers over others. *See also* BeVier, *supra*, 73 Calif. L. Rev. at 1062 (campaign finance legislation deprives the wealthy of the advantage of their position and is not neutral in impact). The State's own description of the statute demonstrates that it is content-based, and thus that the *O'Brien-Vincent* analysis is inapplicable. *See Boos v. Barry*, 56 U.S.L.W.

4254, 4256-57 (U.S. Mar. 22, 1988) (regulation not content-neutral although government itself not selecting between specific views). Here, the State has determined that an entire category of speech—that presented by paid circulators—is not to be presented.

4. The Availability of "Other Avenues" Does Not Justify the Statute's Restriction of Political Speech.

Appellants' emphasis on the availability of "other avenues" of expression, aside from payment of petition circulators, is misplaced. In *Berkeley*, for example, individuals were free to make unlimited expenditures in support of (or in opposition to) ballot measures, yet the Court invalidated a specific limitation on individual contributions to political committees.

Appellees' testimony at trial established that direct compensation to petition circulators is the most effective dollar-for-dollar expenditure of a proponent's funds. *See, e.g.*, J.A. 41. To a group or an individual with modest funding, like appellees here, an invitation to spend unlimited amounts on media advertising is cold comfort. *See Buckley*, 424 U.S. at 19 n.18 ("Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gas").[8]

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[8] It is ironic, if not perverse, that a statute aimed at protecting the "grassroots nature" of the initiative and insuring a "significant modicum" of support penalizes the only effective method available to those of limited means to gain that support, while leaving those with large institutional war-chests free to spend any amount necessary to achieve the desired result through more expensive indirect media advertising and the use of "volunteer" employees as circulators. *See* J.A. 26 (testimony of Paul Grant concerning methods used by supermarket chains to circulate petitions for initiative measure to permit wine sales in grocery stores).

A statute need not close all avenues of expression, or impose a ceiling on expenditures, to invoke strict scrutiny. In *Massachusetts Citizens for Life,* for example, the Federal Election Campaign Act imposed no expenditure limit on a corporation seeking to spend money in connection with an election. The Act did establish burdensome organizational, solicitation, and reporting requirements, however, which "impose[d] administrative costs that many small entities may be unable to bear." 107 S. Ct. at 626. Small incorporated groups formed to disseminate political ideas "might well be turned away" from their advocacy by such requirements, the Court noted, "limiting the ability of such organizations to engage in core political speech." *Id.* Although the Act did not "remove all opportunities for independent spending . . . , the avenue it leaves open is more burdensome than the one it forecloses. The fact that the statute's practical effect may be to discourage protected speech is sufficient to characterize [it] as an infringement on First Amendment activities." *Id.*

II. THE ASSERTED STATE INTERESTS CANNOT SURVIVE STRICT SCRUTINY.

Because the statute "burdens First Amendment rights, it must be justified by a compelling state interest." *Federal Election Commission v. Massachusetts Citizens for Life, Inc.,* 107 S. Ct. 616, 627 (1986). *See also Boos v. Barry,* 56 U.S.L.W. 4254, 4257 (U.S. Mar. 22, 1988) (content-based restrictions on First Amendment rights subject to "the most exacting scrutiny"). Colorado advances two interests to support its ban on payments to petition circulators: (1) an interest in ensuring that initiative measures have a significant modicum of public support, and (2) an interest in protecting the integrity of the initiative process. Neither interest, however, "satisf[ies] the exacting scrutiny applicable to limitations on

core First Amendment rights of political expression." *Buckley,* 424 U.S. at 44-45. And both interests could be satisfied by less restrictive means.

A. The Statute Does Not Legitimately Advance the State's Asserted Interest in Ensuring a Modicum of Support for Initiative Measures.

The State argues that, to ensure that an initiative measure "has a significant modicum of support and that the signatures on the petition reflect actual support rather than the influence of a few, powerful special interests," the number of people circulating petitions must bear some proportion to the proposed initiative's general support among the electorate at large. Brief for Appellants at 16-18. An initiative measure has a modicum of public support, the argument goes, only if petition circulators are spontaneous volunteers; if money is used to hire additional petition circulators, then the ratio of circulators to supporters in the electorate will be "skewed." *Id.* at 17.

This "pro rata" approach to the significant modicum requirement posits that the only measures which belong on the ballot are those which enjoy a broad base of public support *before petitions are circulated and before proponents have had a chance to marshal public support.*[9] But whatever interest the State may have in ensuring that only initiative measures with broad public support reach the ballot, the State has no legitimate interest in restricting initiative proponents in their efforts to *generate* that support through political advocacy. *Hardie v. Fong Eu,* 18 Cal. 3d 371, 378, 134 Cal. Rptr. 201, 204, 556 P.2d 301, 303 (1976), *cert. denied,* 430 U.S. 969 (1977). *See NAACP v. Button,* 371 U.S. 415, 445 (1963)

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[9] The State's argument, if accepted, would also justify any other limitations on expenditures at this juncture, such as restrictions on paid advertising.

("the Constitution protects expression and association without regard to the . . . popularity . . . of the ideas and beliefs which are offered").

The State's argument ignores the fact that if full political debate and expression are allowed, an initiative proposal may acquire the required modicum of public support, *i.e.*, the specified number of valid petition signatures needed to reach the election ballot. The Colorado Constitution requires that, for an initiative to reach the ballot, petitions be signed by "at least five percent of the total number of votes cast for all candidates for the office of secretary of state at the previous general election." Colo. Const. art. V, sec. 1. In this case, that requirement mandated that appellees obtain 46,737 signatures. *Grant v. Meyer,* 828 F.2d 1446, 1448 (10th Cir. 1987) (en banc). The signature requirement by itself therefore satisfies the State's asserted interest in ensuring that only initiative measures with "enough underlying support" appear on the ballot. Brief for Appellants at 18.

The State's real interest is in restricting the voices of those who can afford to pay petition circulators. *See* Brief for Appellants at 17. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley,* 424 U.S. at 48-49. The State cannot "assume the task of ultimate judgment" and "restrict what the people may hear." *First National Bank of Boston v. Bellotti,* 435 U.S. 765, 791 n.31 (1978). "[T]here is no significant state or public interest in curtailing debate and discussion of a ballot measure." *Citizens Against Rent Control v. City of Berkeley,* 454 U.S. 290, 299 (1981).

Underlying the State's argument is a concern that if proponents of an initiative measure can pay petition circulators, they will succeed in persuading more voters to

sign petitions. This Court rejected such a concern in *Bellotti.* Here, as in *Bellotti,* paid advocacy "may influence the outcome of the vote; this would be its purpose." *Id.* at 790. "But the fact that advocacy may persuade the electorate is hardly a reason to suppress it . . . . [T]he people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Id.* at 791. *Accord Brown v. Hartlage,* 456 U.S. 45, 60 (1982) ("[t]he State's fear that voters might make an ill-advised choice does not provide the State with a compelling justification for limiting speech").

In any event, the State's asserted interest in "removing the undue influence of wealth from the [initiative] process" is completely misplaced under the facts of this case. Brief for Appellants at 17. A more "grassroots" group than appellees cannot be imagined. The individual appellees are citizens taking time out from their private lives and, in most instances, from their regular jobs to promote public awareness of governmental issues. J.A. 25. The sole corporate appellee, Coloradans for Free Enterprise, Inc., was founded "to promote free market solutions to problems here in the State of Colorado." J.A. 12. The facts suggest no "potential for unfair deployment of wealth for political purposes." *Massachusetts Citizens for Life,* 107 S. Ct. at 628 (restrictions invalid as applied to non-stock, non-business corporation organized to engage in political speech).

B. The State's Asserted Interest in Protecting the Integrity of the Initiative Process Cannot Justify the Statute.

The State contends that prohibiting payment to petition circulators serves a compelling interest in protecting the integrity of the initiative process and in avoid-

ing the appearance of corruption. Brief for Appellants at 18.

This Court has recognized on several occasions that the risk of corruption perceived in candidate elections "simply is not present in a popular vote on a public issue." *Bellotti,* 435 U.S. at 790. *Accord City of Berkeley,* 454 U.S. at 297-98. Accordingly, the Court has recognized a compelling governmental interest in avoiding corruption or the appearance of corruption only when contributions to a *candidate* are at issue, *Buckley,* 424 U.S. at 26-27, and not when expenditures on *ballot measures* are restricted. *City of Berkeley,* 454 U.S. at 297.

Moreover, here, as in *Bellotti,* the State's concern is unsupported "by record or legislative findings that [the advocacy at issue] threatened imminently to undermine democratic processes." *Bellotti,* 435 U.S. at 789. *See generally City of Berkeley,* 454 U.S. at 299 (record did not support conclusion that limitation on contributions to ballot measure committees "is needed to preserve voters' confidence in the ballot measure process"). Perhaps that is why the State does not articulate its interest in avoiding the appearance of corruption with any specificity.[10] In fact, both the majority and the dissent below agreed that there is no reason to believe that "unpaid volunteers are somehow more trustworthy and dependable than paid solicitors." *Grant v. Meyer,* 828 F.2d at 1460 n.2 (Logan, J., dissenting); *see id.* at 1454 (majority opinion).

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[10] Appellants proffer only abstract legal arguments and historical generalities. The only "facts" appellants discuss are statistics which the State claims demonstrate that ballot initiatives are relatively commonplace in Colorado. These statistics, however, say nothing about the number of initiatives which never reach the ballot because of the effect of the statute. More importantly, the State's figures are irrelevant in considering whether its asserted interests are compelling.

State regulation of speech must be narrowly tailored to address the State's specific concerns and avoid unnecessary restriction of First Amendment rights. *Boos v. Barry,* 56 U.S.L.W. 4254, 4257, 4259 (U.S. Mar. 22, 1988). Colorado has enacted specific provisions to prevent fraudulent conduct in the solicitation of signatures that address the State's corruption concerns. *See* Colo. Rev. Stat. §§ 1-40-106, 1-40-107, 1-40-109, 1-40-118, 1-40-119 (1980 Repl. Vol. & Supp. 1987). These provisions can be, and have been, enforced by the Colorado Secretary of State, *see, e.g., Case v. Morrison,* 118 Colo. 517, 197 P.2d 621 (1948); *Brownlow v. Wunsch,* 103 Colo. 120, 83 P.2d 775 (1938), and are adequate to address any State concern that petition signatures might be obtained fraudulently. *See Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620, 637-38 (1980); *Dunn v. Blumstein,* 405 U.S. 330 (1972).

CONCLUSION

Because the statute restricts political speech and is not narrowly drawn to achieve a compelling governmental interest, *amici* urge that the judgment of the United States Court of Appeals for the Tenth Circuit be affirmed.

Respectfully submitted,

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April 4, 1988

No. 87-920

In The

Supreme Court of the United States

October Term, 1987

NATALIE MEYER, in her official capacity as Colorado Secretary of State, and
DUANE WOODARD, in his official capacity as Colorado Attorney General,

Appellants,

v.

PAUL K. GRANT, EDWARD HOSKINS, NANCY P. BIGBEE, LORI A. MASSIE, RALPH R. HARRISON, COLORADANS FOR FREE ENTERPRISE, INC., a Colorado corporation,

Appellees.

REPLY BRIEF

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I.

REMAND OR CERTIFICATION OF THE NEWLY-RAISED STATE LAW ISSUE IS IMPROPER.

The amici, ACLU, suggest that this Court should remand this matter to address a state law issue which was not raised in the lower courts, or in the alternative, should certify the state law question to the Colorado Supreme Court. The state law issue concerns whether the legislature had the authority to pass the prohibition against payment of circulators. A remand or certification is inappropriate and would not serve the best interest of this Court, the litigants or the public.

The purpose of certification or remand is to save the time, energy and resources of the Court and to build cooperative judicial federalism. *Baird v. Bellotti*, 428 U.S. 132, 150-51 (1976). None of these goals will be met by either remand or certification. The appellants in this case were also defendants in a Colorado state court proceeding in which the authority of the legislature to pass the prohibition was an issue. The appellants herein also appealed the case to the Colorado Supreme Court. *Ford v. City of Commerce City, et al.*, Case No. 86-SA-459 (December 3, 1986). Undersigned counsel was also counsel of record in the state case. Over the objections of the appellants, the Colorado Supreme Court dismissed the case as moot. *See Grant v. Meyer*, 828 F.2d 1446, 1447 n.1 (10th Cir. 1987). Because the State Supreme Court has already rejected an opportunity to decide the issue, cooperative judicial

federalism would not be enhanced by a certification to that same court.

Moreover, a remand to the lower courts to decide an issue which was not raised until the amici brief would not save time, energy or resources. This case has been in litigation for almost 4 years. The appellants have devoted considerable time and expense to litigating this case on the issues framed by the appellees. A remand on an issue which the appellees did not raise would not save time, energy or resources. To the contrary, time, energy and resources would be wasted.

The cases cited by the ACLU are inapposite. In *Elkins v. Moreno*, 435 U.S. 647 (1978) and *Virginia v. American Booksellers Association*, 108 S. Ct. 636 (1988), the state law issues were presented to the lower federal courts and had not previously been presented to the state courts. In *Neese v. Southern Railway Co.*, 350 U.S. 77 (1955), the state law question had already been addressed by the lower federal court. In the case at bar, the state law issue was never raised in the federal courts, and the Colorado Supreme Court had already rejected an opportunity to review the state law issue.

II.

THIS CASE PRESENTS A QUESTION OF BALLOT ACCESS.

Both appellees and the ACLU misperceive the nature of this case. Almost all of the cases cited by both appellees and the ACLU address measures already on the ballot, *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290 (1981) or payments to candidate,

Buckley v. Valeo, 424 U.S. 1 (1976). The case at bar is a ballot access case. One of the major issues in this case is what conditions the state may impose to ensure that the ballot measures have a significant modicum of support.

The distinction between ballot measures and ballot access is important. In ballot access cases, the Court has recognized that the state has a compelling interest in number of candidates regulating the ballot to avoid confusion, deception and frustration of the democratic process. *Munro v. Socialist Workers Party*, 107 S. Ct. 533, 537 (1986). The state has an even stronger interest in regulating the ballot access of initiative measures. Initiative measures are often complex pieces of legislation. Before initiative measures are presented to the electorate, the state has a right to ensure that the support is not skewed by the use of paid circulators who do not necessarily represent the scope of underlying support for the propositions that they are espousing.

One final point must be noted. The appellants have never argued that the petition circulators must stand mute. They may vociferously advocate the merits of the proposed measure. They may not be paid for their efforts, however.

III.

THE PROHIBITION ENHANCES THE INTEGRITY OF THE PROCESS.

The arguments of both appellees and the ACLU overlook a fundamental fact. In establishing the initiative process, the People of the State of Colorado gave to

the petition circulator the duty to affirm the validity of the signatures. The affirmation of the petition circulator converts the petitions into *prima facie* evidence that the signatures are genuine and true and that the persons signing the petition are registered electors. Colo. Const. art. V, sec. 1(6). Because the affirmation creates the legal presumption that the signatures are valid, the state has the right to establish standards which ensure that the creation of the legal presumption is free from taint. The petition circulator is both an advocate and a guarantor of the fairness and legitimacy of the signature-gathering process. The state has the right to regulate the petition circulator in his role as a guarantor of the process. *Pirincin v. Board of Elections of Cuyahoga County*, 368 F. Supp. 64, 71 (N.D. Ohio 1973), *aff'd mem.*, 414 U.S. 990, 94 S. Ct. 345, 38 L. Ed. 2d 231 (1973). The prohibition preserves both the integrity of the initiative process and the individual's confidence in government. *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 788-789 (1978). Given the unlimited methods of advocacy available, the prohibition is, at worst, *de minimis*.

CONCLUSION

The decision of the Tenth Circuit declaring the prohibition against payment of circulators to be unconstitutional must be reversed.

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